TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 543

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

NOAH MOQUIN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR CERTIORARI FILED NOVEMBER 12, 1930

CERTIORARI GRANTED DECEMBER 8, 1930

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IN DISTRICT COURT OF PINE COUNTY, NINETEENTH JUDICIAL DISTRICT

NOAH MOQUIN, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant

COMPLAINT

Plaintiff for his complaint in the above entitled action alleges and shows to this court:

1st. That the defendant now is and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the state of Minnesota, and as such operating a commercial line of railway in the state of Minnesota, and other states, hauling freight and passengers thereon as a common carrier for hire.

2nd. That on and previous to the 27th day of February, 1928, the above named plaintiff was employed by defendant as its agent and servant, and as a freight brakeman, and as [fol. 2] such it was his duty to work on, around and about the railway tracks and cars of defendant and to do the work ordinarily and commonly done by persons similarly employed.

3rd. That at all times herein mentioned the defendant was an interstate carrier and was engaged in interstate commerce, and that plaintiff was employed by defendant as its servant and employee, and as such was working and engaged in interstate commerce at the time of receiving the injuries herein set forth.

4th: That at all times herein mentioned and on and previous to the 27th day of February, 1928, the defendant had and maintained at the station of Cloverton, in the state of Minnesota a certain railway station, yards and tracks consisting of main, side, house and passing tracks as commonly used by defendant in its work as a common carrier of freight and passengers for hire; that at said time and

place, while plaintiff was working as a freight brakeman for said defendant and while he was acting within the scope and course of his employment and within the line of his duties, he was upon a certain railway freight car of defendant being moved and switched by said defendant, its agents and servants, in said yards at Cloverton, Minnesota; that at said time and for a long period of time previous to said 27th day of February, 1928 the said defendant negligently, recklessly and carelessly allowed and permitted said house track to be and the same was in a dangerous and unsafe condition for the movement of cars thereon; that said [fol. 3] defendant negligently, recklessly and carelessly allowed and permitted said house track to be and it was covered with debris, snow and ice so that the same was unsafe for the passage of railway freight cars over and upon said tracks; that defendant negligently, recklessly and carelessly allowed snow and ice to accumulate on said house track so as to render the same dangerous and unsafe and that defendant negligently, recklessly and carelessly failed and neglected to inspect said house track and negligently, recklessly and carelessly ordered and directed plaintiff to work thereabout and to ride said car down said track without having ascertained whether the same was in a safe condition for use in switching operations; that said defendant negligently, recklessly and carelessly failed to remove said ice and snow and negligently, recklessly and carelessly failed to take any precautions to remedy or make safe said house track; that said defendant, its agents and servants in charge of said track so being switched as aforesaid and working with plaintiff as members of said train crew, negligently, recklessly and carelessly ordered and directed that the cars so being switched, among which was the car upon which plaintiff was riding, be switched and moved onto said house track; that said defendant, its agents and servants in charge of said switching movement, negligently, recklessly and carelessly caused said cars to be switched in onto said house track at a high and dangerous rate of speed; that said defendant, its agents and servants, negligently, recklessly and carelessly advised plaintiff that said [fol. 4] house track was in good condition and safe for the operation of cars and trains upon the same; that said track was not in fact in good condition or safe for such operations; that at said time and place, as aforesaid, while said

switching operations were being performed and said cars were being moved and shoved onto said house track, the car upon which plaintiff was riding was caused to and did become derailed and as a result thereof plaintiff was thrown from the top of said car to the ground sustaining the severe and permanent injuries hereinafter set forth.

That said derailment was caused and contributed to by the negligent, reckless and careless acts, conduct and omissions of defendant as herein set forth.

5th. That by reason of the negligence of the defendant, as herein alleged, plaintiff was thrown to the ground and was severely and permanently injured in and about his head, neck, back, spine and shoulders; that both of his legs were severely and permanently injured and bruised; that his right arm was severely and permanently injured; that he sustained a severe shock to his nervous system; that he sustained severe internal injuries; that all of said injuries caused plaintiff great pain and suffering and he is advised and believes that all of the same are permanent and that he will always suffer therefrom.

6th. That previous to his injuries plaintiff was an able-bodied man and could and did earn at his employment as a [fol. 5] freight brakeman approximately two hundred fifty ($250.00) dollars per month; but that by reason of being injured, as herein set forth, plaintiff's earning capacity has been wholly lost and destroyed.

7th. That by reason of all the facts aforesaid, plaintiff has been injured to his damage in the sum of sixty thousand ($60,000.00) dollars.

Wherefore plaintiff demands judgment against defendant in the sum of sixty thousand ($60,000.00) dollars, together with the costs and disbursements of this action.

Davis, Michel & Yeager, Plaintiff's Attorneys, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

(Summons and Complaint served September 12th, 1928.)

IN DISTRICT COURT OF PINE COUNTY

ANSWER

Defendant interposes the following answer to the complaint:

I

It admits that it is, and at all times material was, a railway corporation operating a system of railroads in Minnesota and adjacent states, and that one of its lines extends from Minneapolis to Duluth, on which line is the station of Cloverton, and at which station it maintains three tracks consisting of main, passing and house track. It admits that on or about February 27th, 1928, plaintiff was [fol. 6] in its employ as a freight brakeman and conductor. It admits the interstate character of its business and of plaintiff's employment. It admits that on or about said 27th day of February, 1928, at Cloverton, plaintiff sustained some injuries. It denies that said injuries are permanent in character as alleged in the complaint or otherwise. It specifically denies that such injuries as plaintiff did sustain were caused or contributed to by any negligence, want of care, or breach of legal duty, on the part of defendant.

II

It alleges that such injuries as plaintiff did sustain were due to risks and hazards which plaintiff knowingly and voluntarily assumed. It alleges that such injuries as plaintiff did sustain were directly and solely caused by his own negligence and want of care in the performance of the work to which he was assigned. It alleges that such injuries as plaintiff did sustain were directly and proximately contributed to by his own negligence and want of care. It alleges that, if not due to causes hereinbefore alleged, such injuries were due to unforseeable and unavoidable accident for which defendant is in no manner responsible.

III

It expressly denies each and every allegation, averment matter and thing, and each and every part thereof, in said complaint contained, save as hereinbefore admitted, qualified or specifically denied.

[fol. 7] Wherefore defendant prays that plaintiff take nothing by this action, and that it have judgment for its costs and disbursements herein.

Dated September 20th, 1928.

Fryberger, Fulton & Boyle, 712 Lonsdale Building, Duluth, Minnesota; John E. Palmer, 1427 Soo-Line Building, Minneapolis, Minnesota, Attorneys for Defendant.

(Served September 20th, 1928.)

IN DISTRICT COURT OF PINE COUNTY

REPLY

Plaintiff, for his reply to the answer of the defendant in the above entitled action, alleges and shows to this court:

Plaintiff denies each and every allegation and each and every part thereof in said answer contained, except as the same admits the allegations contained in plaintiff's complaint.

Wherefore, plaintiff demands judgment as prayed for in said complaint.

Dated this 20th day of September, 1928.

Davis, Michel & Yeager, Attorneys for Plaintiff, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

(Served September 21st, 1928.)

[fol. 8] IN DISTRICT COURT OF PINE COUNTY

STIPULATION CHANGING VENUE

It is hereby stipulated by and between the parties to the above entitled action that the venue thereof may be changed from the county of Pine to the county of Crow Wing, in the state of Minnesota, and that the clerk of the District Court of Pine county may transfer all files in his office in said matter to the clerk of the District Court of Crow Wing county, Minnesota.

Dated this 23rd day of October, 1928.

Davis, Michel & Yeager, Plaintiff's Attorneys. Fryberger, Fulton & Boyle and John E. Palmer, Defendant's Attorneys.

IN DISTRICT COURT OF PINE COUNTY

ORDER CHANGING VENUE

Pursuant to the above stipulation,

It is ordered, that the venue of the above entitled action be changed from the county of Pine to the county of Crow Wing, in the state of Minnesota and that the clerk of the District Court of Pine county is authorized and directed to transfer all files in his office in said matter to the clerk of the District Court of Crow Wing county, Minnesota.

Dated this 24th day of October, 1928.

Alfred P. Stolberg, Judge of the District Court.

[fol. 9] IN DISTRICT COURT OF CROW WING COUNTY, 15TH JUDICIAL DISTRICT

NOAH MOQUIN, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant

Settled Case

CAPTION

The above entitled action came on for trial at the May, 1929, general term of the above named court, at the court house, in the city of Brainerd, said county and state, on Monday, May 20, 1929, before the Honorable Graham M. Torrance, judge, and a jury duly impaneled.

Davis & Michel and Swanson, Swanson & Swanson appeared as counsel for plaintiff, and Fryberger, Fulton & Boyle and D. H. Fullerton appeared as counsel for defendant.

NOAH MOQUIN, plaintiff, called in his own behalf, duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. How old are you?

A. Forty-six.

[fol. 10] Q. When were you forty-six?

A. The 8th of September, 1928.

Q. Mr. Moquin, you were a brakeman on the Soo line railroad?

A. Yes, sir.

Q. How long had you worked for the Soo line before this injury in February, 1928?

A. Eighteen years.

Q. Had you worked at railroad work for any other railroad previous to that time?

A. I worked for the Wisconsin Central two years and a half.

Q. So that practically twenty to twenty-one years of your life has been spent as a railroad man?

A. Yes, sir.

Q. And in what line of work did you engage?

A. Brakeman.

Q. All of that time?

A. All of that time.

Q. Describe briefly the general work of a brakeman, what a brakeman has to do?

A. Well, a brakeman has to switch cars, ride cars, unload freight, set brakes, ride cars at night in all kinds of weather.

Q. Is it work which you consider reasonably hard work?

A. Yes, sir.

Q. You had worked for the Soo line nearly eighteen years?

A. Eighteen years.

[fol. 11] Q. Where were you living at the time of your injury?

A. Superior, Wisconsin.

Q. Was this train which you were running a freight or passenger?

A. Freight train.

Q. Did it carry passengers?

A. Yes, sir.

Q. Ran from Superior to where?

A. Ran from Superior to Dresser Junction one day and back to Superior the next.

Q. Leaving Superior you go what general direction as railroad men say, east or west?

A. West.

Q. Out from Superior to Dresser Junction?

A. Yes, sir.

Q. You would lay over there?

A. Lay over there over night and be there in the morning.

Q. Then you would leave the next morning and go east to Superior?

A. Yes, sir.

Q. Sundays were spent where?

A. Superior.

Q. You didn't work on Sundays?

A. No, sir.

Q. It was a six day job?

A. Yes, sir.

Q. How long had you been on this run from Superior to Dresser Junction?

A. Practically sixteen years.

Q. Both summer and winter?

[fol. 12] A. Yes, sir.

Q. I presume you had during those sixteen years the opportunity of observing the general weather conditions along the line of railroad?

A. Yes, sir.

Q. Snow, its fall at different times, especially in February and January of the year, along that line of railroad?

A. Yes, sir.

Q. I presume you had experience or opportunity to observe when snow fell as to what would be done with reference to notifying you men as to the condition of the tracks; did you have the opportunity of observing that?

A. Yes, sir.

Q. Do you know from your experience covering sixteen years what was the practice and custom on the Soo line of notifying the railroad crew of the condition of the tracks?

A. Yes, sir.

Q. What was that custom?

Mr. Boyle: That is objected to as incompetent, irrelevant and immaterial and no proper foundation laid for it.

The Court: Objection overruled. The witness may answer.

Mr. Boyle: May we have an understanding as to exceptions?

The Court: Yes, an exception will be noted by the reporter to each and every adverse ruling of the court.

A. The custom of us being notified of the condition of [fol. 13] the tracks in bad weather came from the train dispatcher.

Q. Now, then, as to the condition of the tracks, if the tracks were covered with ice do you know, during the sixteen years that you worked there, whether or not it was the practice and custom to notify the train crews of that condition?

A. Yes, sir.

Mr. Boyle: The same objection as last above.

The Court: The same ruling.

(Exception by defendant.)

Q. Was that the custom?

A. Yes, sir.

Q. Do you know, from your experience during those sixteen years, what the practice and custom was when you were ordered to flange, as to what that meant with reference to the condition of the tracks?

A. Yes, sir.

Q. What was that custom?

Mr. Boyle: That is objected to as incompetent, irrelevant and immaterial and no proper foundation laid for it.

The Court: The same ruling.

(Exception by defendant.)

Mr. Davis: What was that custom? Just tell the jury.

A. When we had to flange we got a message from the train dispatcher to flange the tracks and where to flange.

Q. Now, during all those years when you flanged, were [fol. 14] you ever ordered to flange tracks where they were covered with ice?

Mr. Boyle: Now——

A. No, sir.

Mr. Boyle: We would like to have the answer stricken so that we may make a record on our objection, if your Honor please, or otherwise have the objection go before the answer.

The Court: Very well.

Mr. Boyle: The same objection as last above. Now, may we have the answer stricken for the purpose of objection?

The Court: Yes.

Mr. Boyle: Then we wish to object to this, if your Honor please, for the reason that it is incompetent, irrelevant and immaterial and no proper foundation laid for it.

Mr. Fryberger: And if I may add, the question that we are to try is what was done in this case, not what the custom was.

Mr. Davis: Goes to the knowledge and the orders to this man; clearly material.

The Court: The witness may answer.

(Exception by defendant.)

Mr. Davis: Your answer was, no, sir, I believe, you were never ordered, as I understand you, to flange tracks when they were covered with ice?

A. No, sir.

Q. During the sixteen years you worked there?

A. No, sir.

Q. Do you know from your experience covering sixteen years what was the custom and practice on the Soo road as to who should inspect the condition of those tracks and [fol. 15] ascertain their condition?

A. Yes, sir.

Q. Whose duty was it?

Mr. Boyle: Now, wait a minute.

A. The section——

Mr. Boyle: Just wait a minute. If your Honor please, may we have the witness wait with his answers until we make our objection?

Mr. Davis: Yes, if you will, please.

The Court: Yes. After this wait a reasonable length of time so that counsel may make an objection if they desire to do so.

Mr. Boyle: Now we move that the answer be stricken, if your Honor please.

The Court: It may be stricken.

Mr. Boyle: Now, this is objected to as being incompetent, irrelevant and immaterial and no proper foundation is laid for it, hasn't anything to do with the issues in this case.

Mr. Davis: Goes directly to the knowledge of the company.

The Court: The witness may answer.

(Exception by defendant.)

Mr. Davis: Whose duty was it to inspect those tracks as to their condition as to whether or not it was safe for cars to go upon them?

A. The section men.

Q. And do you know from your experience covering sixteen years, whether or not, where tracks were covered with ice, from your own experience and observation, it had been the habit and custom of the section men to notify either [fol. 16] the roadmaster or the train crew?

Mr. Boyle: The same objection as above.

A. No, sir.

The Court: The same ruling.

(Exception by defendant.)

Mr. Davis: If the section crew would find the track covered with ice, who would they notify?

A. The train dispatcher.

Q. And who would the train dispatcher then notify?

A. Train crews and conductor.

Q. Was that the practice on that line of road during the sixteen years you worked there?

A. Yes, sir.

Q. On the day in question when you left Superior you were going west, I believe?

A. Yes, sir.

Q. What time did you leave Superior?

Seven A. M.

Q. Do you recollect your first stop?

A. The first stop was Boylston Junction.

Q. Do you recollect now what work was done at that junction?

A. We just stopped there for orders, branched off on our own line.

Q. Where was the next stop?

A. Town called Patzau.

Q. What work, if any, was done there?

A. I don't remember any work being done there.

Q. What was the next stop?

A. Harlis.

[fol. 17] Q. And at Harlis do you know what work was done by some of the train crew?

A. We flanged the passing track there.

Q. Who did that work there?

A. The head brakeman.

Q. Who else, the engineer?

A. Engineer.

Q. Did you take part in any of that work or have anything to do with it?

A. No, sir.

Q. When they arrived at Harlis, I will ask you if the tracks generally, in railroad parlance, ran east and west, as they call it?

A. Yes, sir.

Q. There would be what is known as house tracks and passing tracks to one side of what would be the main line?

A. Yes, sir.

Q. Do you recollect now at Harlis whether the tracks as you would be going west on the main line would be either to the right or left of the main line?

A. This track at Harlis going west is to the left of the main line.

Q. At Harlis when that work was done describe generally and briefly how that engineer and head brakeman did that flanging at Harlis?

A. He pulled out to clear the main line and cut off the engine——

Mr. Boyle: Just a moment.

A. —and backed down over the passing track.

Mr. Boyle: We object to the manner in which the flang-
[fol. 18] ing was done at Harlis, if your Honor please, for the reason that it is incompetent, irrelevant and immaterial.

Mr. Davis: I will state to the court why I think it is material if I may.

The Court: I will hear you.

Mr. Davis: Because it shows the knowledge of this man as to how the work was being done, has a bearing on how it was done at this other place, Cloverton, and we will also show that at another point it was done in a similar manner. It goes directly to this man's knowledge as to how the work was being done and as to his care or want of care.

The Court: The witness may answer.

(Exception by defendant.)

Mr. Davis: Now, will you describe briefly to the jury what the engineer did there in flanging that track at Harlis?

A. Well, they pulled up to clear the passing track, cut off the engine and backed through.

Q. Just a moment, if I may try to make one thing plain to the jury. This is a rather crude drawing. This represents the main line track and this to the left would be the passing track at Harlis?

A. Yes, sir.

Q. Going west. When you said pulling up to clear the passing track I wish you would explain that to the jury.

A. Well, you know the passing track comes into the main line and when we pull up to clear we mean so we can cut
[fol. 19] off and come in there with the engine.

Q. Which way did he pull, east or west, when he pulled up to clear the passing track at Harlis?

A. West.

Q. Then he would pull his engine west beyond a switch?

A. Yes, sir.

Q. Then the switch would be thrown and then he backed his engine in?

A. Yes, sir.

Q. To the east end of the passing track?

A. Yes, sir.

Q. When he was doing that would he be doing a flanging operation at all?

A. No, sir.

Q. When he would come back through the snow at the east end what would he do with his flange which was on the pilot?

A. When he got clear back he dropped it clear down.

Q. For what purpose? Just explain the working of the flange after he would drop it down, would he come to the east or west?

A. Come west and the flange is for the purpose of throwing the snow out from between the rails.

Q. This flange is attached, as I understand it, to the front of the pilot?

A. Yes, sir.

Q. How is it operated? By what means?

A. By air. The engineer operates it from the engine.

[fol. 20] Q. May it be lifted and lowered?

A. Yes, sir.

Q. When it is lifted does it operate?

A. No, sir.

Q. When it is lowered then it operates?

A. Yes, sir.

Q. This flange, can you describe generally to the jury about how wide it is?

A. It is a little bit wider than the track in order to throw the snow.

Q. And what is the width of the track—four feet eight?

A. Something like that.

Q. Are there little edges on each side of the flange that run against the inside of the rails?

A. Yes, sir, to clean off the ball of the rail, inside of the rail.

Q. This being the inside of a rail, the side of the reporter's table nearest the jury, this flange would drop down and run close to or touch directly against the inside of the rail, is that correct?

A. Yes, sir.

Q. And throw the snow out?

A. Yes, sir.

Q. And what is the purpose of doing that?

A. That is to keep so the flange of the car won't come in contact with ice or snow and be de-railed.

Q. There is on all cars what is known as a flange to the wheel?

A. Yes, sir.

Q. And that is a circular piece of iron?

A. Yes, sir.

[fol. 21] Q. And that runs up against the inside of the rail, does it?

A. Yes, sir.

Q. And on the opposite wheel there is a flange which runs on the opposite rail?

A. Yes, sir.

Q. That is for the purpose of preventing the cars from leaving the track?

A. Yes, sir.

Q. That flange is about how long, that is, below the ball——

A. Inch and a quarter or inch and a half.

Q. Then the wheel itself when it is on the rail is from an inch to an inch and a half higher than the bottom of the flange?

A. Yes, sir.

Q. At the time this work was done by the engineer at Harlis, did you have any part in doing that work?

A. No, sir.

Q. When the flanging was done coming west was the snow thrown?

A. Yes, sir.

Q. What kind of snow did it appear to be that morning?

A. Oh, it was just a soft snow.

Q. You experience- no difficulty in the flanging?

A. No, sir.

Q. Did you experience any difficulty or notice them experience any difficulty when they backed the engine through before they flanged?

A. No, sir.

[fol. 22] Q. Went right through the snow all right?

A. Yes, sir.

Q. After you had done that work at Harlis, did you go on west?

A. Yes, sir.

Q. Was there a flanging operation made by the engineer at another point before you reached Cloverton?

A. Yes, we flanged at Belden.

Q. State to the jury what was done in flanging there, whether the engine was backed through the snow before the flanging operation or after?

A. Yes, sir.

Mr. Boyle: Wait a minute. That is objected to as incompetent, irrelevant and immaterial.

The Court: The same ruling.

(Exception by defendant.)

Mr. Davis: It was backed through?

A. Yes, sir, the same way.

Q. Did you experience or notice that they experienced any difficulty as the engine backed through the snow, running the engine backwards through the snow, before the flanging operation?

A. No, sir.

Mr. Boyle: The same objection.

The Court: The same ruling. I take it you may have the same objection and the same ruling to all of this line of testimony.

Mr. Boyle: Yes, all right. Thank you, your Honor.

(Exception by the defendant.)

Mr. Davis:

[fol. 23] Q. When you back- or the engineer backed the engine up at Belden he backed it through the snow?

A. Yes, sir.

Q. At Harlis and Belden about how high were these drifts of snow, approximately?

A. Oh, some places a little higher than others; about eight, nine or ten inches.

Q. As they backed this engine through at Harlis and at Belden before these flanging operations was any difficulty experienced in backing that engine through that snow?

A. No, sir.

Q. At Belden after he had backed up with the engine, did the engineer then drop his flange and come forward going west?

A. Yes, sir.

Q. And that performed the same flanging operation on the rails?

A. Yes, sir.

Q. And threw the snow to one side?

A. Yes, sir.

Q. What was the condition of the snow generally as to being hard or soft?

A. Oh, just seemed to be soft snow.

Q. You went on west then?

A. Yes, sir.

Q. When you got to Cloverton you had some work to do at Cloverton?

A. Yes, sir.

Q. What work did you first do at Cloverton?

[fol. 24] A. When we arrived at Cloverton we unloaded a little freight.

Q. Then where did you go?

A. Unloaded a little freight and then pulled up over the crossing. I went over to the crossing there and the head man went——

Mr. Davis: Talk as loudly as you can.

A. When we arrived at Cloverton we unloaded a little freight. Then they pulled the train up to clear the caboose over the crossing.

Mr. Davis: Will you boys have a plat?

Mr. Boyle: Yes, we might just as well use that.

Mr. Davis: Yes, I would think so, to avoid some rather crude pictures.

Mr. Boyle: In fact, if you want to do it we could put Mr. Loomis on the stand and have him give us measurements and all that sort of thing.

Mr. Davis: Very well, then. Mr. Loomis.

Mr. Boyle: We will make this Defendant's Exhibit 1, will we?

Mr. Davis: Yes.

Mr. Davis: I might ask Mr. Moquin one question here.

Q. When this train came from the east going west at Cloverton, on which side of the track was the depot, as to being on your left or right side?

A. The depot was on the left side and the tracks on the right side.

Mr. Boyle: We are traveling west. To the left on this plat.

Mr. Davis: Yes. For the purpose of understanding the plat, in railroad parlance, west.

[fol. 25] Mr. Fryberger: Sometimes it is just the reverse of what the directions are.

Mr. Boyle: Yes. The fact is that the track at this point runs north and south, but in railway parlance, as Mr. Davis says, they call it traveling west or traveling east. They never travel north and south on the railroad, apparently.

Mr. Davis: Never. Not on these western roads.

Mr. Fryberger: The course is really directly south, but they call southwest.

Mr. Davis: If we may have Mr. Loomis sworn for cross examination by the plaintiff, if it is agreeable.

Mr. Boyle: Yes.

L. E. Loomis, called by plaintiff for cross-examination, duly sworn, testified as follows:

Cross-examination.

By Mr. Davis:

Q. You are employed by the Soo railroad?

A. Yes, sir.

Q. As a civil engineer?

A. Yes, sir.

Q. I believe you made Defendant's Exhibit 1, that plat in question?

A. Yes, sir.

Q. This plat shows the main line track, the passing track and the house track at Cloverton, Minnesota?

A. Yes, sir.

Q. And for railroad use we would say, would we not, [fol. 26] that the tracks run in an easterly and westerly direction?

A. Yes, sir.

Q. That is generally, is it not, regardless of the points of the compass?

A. Yes.

Q. Over to the right of this exhibit as it faces the jury and where Defendant's Exhibit 1 is stamped would be to the east?

Mr. Boyle: North.

Mr. Davis:

Q. But east in railroad terms?
A. To the east in railroad terms.
Q. And to the other side where it says to Dresser Junction would be to the west?
A. Yes, sir.
Q. As a matter of fact, of course, these tracks do not run directly east and west at that point?
A. No, they run very nearly due north and south.

Mr. Davis: We will, for the purpose of this case, call them east and west, if it is agreeable.
Mr. Boyle: Yes.

Mr. Davis:

Q. Now, you have upon this exhibit on the main track a notation "Highway Crossing; Look Out Sign"?
A. Yes, sir.
Q. At the right side of the plat?
A. Yes, sir.
Q. The little rectangular marks extending slightly beyond the rails of the passing track and the main line track [fol. 27] represent crossings?
A. Crossing planks, yes.
Q. Crossing planks of a crossing which runs diagonally or horizontally across the tracks?
A. It runs across the track at right angles, practically.
Q. I notice here the figures 1350.7 to north switch of passing track; that represents 1350.7 feet from the north switch of the house track to the north switch of the passing track?
A. Yes, the north switch or west switch—or I should say the north switch or the east switch, as we call it in railroad terms, is not shown on the map, so I have put the distance on to show the distance up to the switch from the east house track switch.

Q. Is this up here just a little east of the hand car house, the east house track switch?

A. Yes, sir.

Q. And the east passing track switch would be further east?

A. 1,350 feet.

Q. East?

A. East, yes.

Q. Then, this first line labeled "Main Track" is the track that runs closer to the depot?

A. Yes.

Q. The depot marked here would be to the left of the train as they came west?

A. Yes.

Q. There is a cinder filled platform to the west of the depot?

[fol. 28] A. Yes, sir.

Q. To what scale is this plat drawn?

A. One inch equals fifty feet.

Q. Then, in front of the depot there is a concrete platform?

A. I believe it is. Yes, sir, concrete.

Q. I notice the statement "Warehouse" over toward the right-hand side, the word "Ware Ho," that means warehouse?

A. Yes, sir.

Q. And that is a warehouse to the right of the tracks as you would be going west?

A. Yes.

Q. Then, to the west I notice you have made the notation "Concrete Foundation Blocks," those were blocks that were piled up there?

A. No, those were concrete pedestal blocks. They apparently had been used as a foundation for a warehouse that wasn't there at the time.

Q. When was this plat made?

A. This plat was made October 17, 1928.

Q. That was some eight or nine months after the accident?

A. I don't know when the accident occurred.

Q. February 27th.

A. Yes.

Q. Do you know whether or not these concrete foundation blocks were there at the time of the accident?

A. No, sir.

Q. I notice you make a statement here "Marks on the [fol. 29] West Rail"; what marks were on the west rail?

A. Well, they were dents in the rail as though some car had been derailed at that point.

Q. In other words, there were dents in the rails showing where the flange had marked the rail as it went off the rail?

A. That was it, yes, sir.

Q. I presume when you were taken to this point someone employed by the company pointed out to you where this car was derailed at the time Mr. Moquin was hurt, where it had left the track?

A. Yes, sir.

Q. And this is the point which was pointed out to you?

A. Yes, sir.

Q. You don't know yourself where it was?

A. No.

Q. How many marks were there, there?

A. There were marks at five different places on the rail.

Q. You mean flange marks?

A. Yes, sir.

Q. Showing that the wheel had gone across five differen. times across the rail?

A. Well, I couldn't say as to whether it had gone across five different times, but it might have struck the rail and then been deflected along inside the rail a little bit and hit it again, pretty near went over.

Mr. Boyle: Wouldn't it be five sets of wheels?

A. No, I don't think that.

[fol. 30] Mr. Davis:

Q. Anyway, these five marks were on top of the rail?

A. Yes, or just inside the ball.

Q. Were there marks on the top of the rail?

A. I think there was as much on the top of the rail as on the top corner on the inside and on the inside of the ball.

Q. So those five marks would indicate to you that they were the flange marks of a wheel of a boxcar, engine or passenger coach that had cut into the rail?

A. Apparently, yes.

Q. I notice you have indicated a coal shed which is some distance west of this point where the marks of the wheel were on the west rail; that indicates a coal shed there?

A. Yes, sir.

Q. Then, there is marked "Main Street crossing," which crosses at practically right angles over the track at that point?

A. Yes, sir.

Q. To the west of that is an oil house and some oil tanks to the west of that crossing?

A. Yes, sir.

Q. Still farther west there is a stock yard and a shed?

A. Yes, sir.

Q. Those buildings which I mentioned are all, as the train would be going west at Cloverton, to the right of the track?

A. Yes, sir.

[fol. 31] Q. The house track is marked in red pencil or ink?

A. It is indicated in red.

Q. The space between the rails of the passing track and the main track is left as the paper on which the plat is made?

A. Yes.

Q. And over at the south switch of the house track there is indicated the south switch of the house track?

A. Yes, sir.

Q. And to the west of that some distance is the south switch of the passing track?

A. Yes, sir.

Mr. Boyle: You have measurements or can give us the distances between all the different points on the plat, Mr. Loomis?

A. Yes, sir.

Mr. Davis: It is on there to the scale of fifty feet to the inch, so we can measure ourselves.

(Witness excused.)

NOAH MOQUIN, plaintiff, recalled in his own behalf, testified as follows:

Direct examination.

By Mr. Davis:

Q. Mr. Moquin, we have examined Mr. Loomis as to the plat, Defendant's Exhibit "1," and you have heard that testimony?

A. Yes, sir.

Q. I understand when you came into Cloverton your en-

[fol. 32] gine was headed west?

A. Yes, sir.

Q. You pulled up to the depot, did you?

A. Yes, sir.

Q. What did you do there?

A. We unloaded a little freight out of the way cars.

Q. What was the next thing you did?

A. Pulled over the crossing.

Q. Over this crossing known as the Main street crossing?

A. So the caboose would be over the crossing. West of the crossing.

Q. Then, what was done?

A. Then the head brakeman, he cut off the engine and came in on the house track.

Q. He cut off the engine and the engine would go west on the main line up to the——

A. Switch.

Q. —the switch, the south switch of the passing track?

A. Yes, sir.

Q. Then, what was done with the engine?

A. Then he backed in on the house track.

Q. That would be the track in red ink or pencil?

A. I don't know if that is the one or not.

Q. I am stating it is. He backed in on the house track?

A. Yes.

Q. What work did you do then?

A. Well, as he was coming in the conductor got orders to pick up a car of ties.,

[fol. 33] Q. Where was this car of ties, on what track?

A. On the house track, just west of the crossing.

Q. On the house track, just west of this crossing?

A. Yes, sir.

Q. Was there any other car on this house track west of the car of ties?

A. There was an empty just up to the clear.

Q. You mean to clear what, the switch?

A. To clear the passing track.

Q. Up west and near the passing track?

A. Yes, sir.

Q. Before they backed in on that track to couple on to the empty and the car of ties, did you receive any instructions from the conductor as to what they should do?

A. Well, I was standing at the crossing there and the conductor come from the depot and said, "I got a message here to change the billing on some cars." He said, "Tell Dan to back in on the house track and after he couples on to that car of ties, to shove down, back down, on the house track and flange it out."

Q. Did you then go back to this track, the house track?

A. Yes, sir.

Q. And did you get on any car?

A. Then I went up to the car and the brake was set. I got up to let the brake off.

Q. Of what car?

A. The car of ties.

[fol. 34] Q. Was that part of your work as a brakeman that day?

A. Yes, sir.

Q. When you released the brake on the car of ties, was there a coupling made with the engine and the empty car to the car of ties?

A. Yes.

Q. Then, what was the next movement?

A. Then we backed down over the crossing.

Q. And where did you remain?

A. On the top of the car.

Q. For what purpose?

A. To protect the crossing.

Q. That is this Main street crossing you went over?

A. Yes, sir.

Q. Was that a part of your duty?

A. Yes, sir.

Mr. Boyle: Just a minute. Now, this is objected to as not the best evidence, incompetent, irrelevant and immaterial, calling for a mere conclusion.

Mr. Davis: I don't know who would know it better.

The Court: Was that a part of his work?

Mr. Davis: Yes, a part of his duty.

Mr. Boyle: Whether it was his work at that time and this comes right downt to a point that is involved in the case, which would be set forth in a rule that was furnished to the employe, if your Honor please.

Mr. Davis: That might all be true, but that would not go [fol. 35] to the admissibility of this testimony, merely to its weight.

The Court: The objection is overruled. The witness may answer. I think he has answered. The answer may stand.

Mr. Davis: Yes. All right.

Q. As the cars then backed through on the house track, they backed to the east, I believe?

A. Yes, sir.

Q. And you rode this car of ties over the crossing?

A. Yes, sir.

Q. And watched the crossing?

A. Yes, sir.

Q. After the engine would have backed itself up to the east end of the house track, then the engineer would do what?

A. He would let his flanges down and flange it out.

Q. Flange this track out if that operation had been performed?

A. Yes, sir.

Q. Was it while you were backing up here that you met with this injury?

A. Yes, sir.

Q. As they started to back the engine from the west end of the house track, you may tell the jury whether or not there was snow covering the track as they backed it through, up to and beyond the crossing.

A. Yes, sir.

Q. About how high would you say, at different points, the snow was which covered the track?

[fol. 36] A. Oh, it is eight or ten inches in places.

Q. As it backed up after coupling the empty to the car of ties that backed the two cars and the engine on the house track?

A. Yes, sir.

Q. You were on top of the car of ties as the engine started back to couple on to the empty and to couple on to the car of ties?

A. Yes, sir.

Q. You may tell the court and jury whether or not the car backed up there without any difficulty.

A. As I was on top of the car watching the head brakeman come back with the engine and that empty and come through that snow.

Q. About how fast, would you say?

A. Oh, it was coming eight or ten miles an hour.

Q. Did they have any difficulty as they backed these cars through the snow?

A. No, sir.

Q. That snow, you say, would be from eight to ten inches high over the track?

A. Yes, sir.

Q. After backing over the crossing they continued east, did they?

A. Yes, sir.

Q. How far east did they continue before you met with an accident?

A. About 150 feet.

Q. I wish you would tell the jury what then happened.

[fol. 37] A. Well, after we coupled down we backed over the crossing and we backed through quite a solid drift of snow.

Q. Did you meet with any difficulty doing that?

A. No, sir.

Q. Go ahead.

A. Then we backed down further, as I have said, 150 feet from the crossing and the car left the track just like a shot. The car went to the left and I was thrown to the right on the ground or rail.

Q. Tell the jury what happened to you.

A. I lit on my both feet and my back and on my arm and I was dazed for a few minutes. As my head cleared up again I saw the fireman coming from the engine and he motioned and hollered back at the engineer and says,

"Moquin is hurt," and he came up there and afterwards I noticed the brakeman there, the other brakeman, and the engineer, he came very near there and then he turned back and he says, "I wonder what the deuce put that car off."

Mr. Boyle: Just a minute. Who said that?

A. The engineer.

Mr. Davis: Go ahead.

Mr. Boyle: Well, now, we object to what the engineer said at that time, if your Honor please, it being incompetent, irrelevant and immaterial.

Mr. Davis: It may possibly be. Well, don't state what the engineer said.

The Court: That objection will be sustained.

Mr. Davis: Yes. Now, when the engineer came down [fol. 38] there, you heard him say something?

A. Yes.

Q. Don't state what he said. And as he was there near that point, were you lying or sitting on the ground?

A. Yes, they had kind of—the fireman and the brakeman had kind of lifted me up and I was sitting facing the car.

Q. And as your sat there, did you see the track where the car had gone off?

A. Yes, sir.

Q. Do you know, from your own knowledge, what caused the car to go off the track?

A. Yes, sir.

Q. What did?

Mr. Boyle: Wait a minute.

A. Ice.

Mr. Boyle: This is objected to as calling for a conclusion of the witness and no proper foundation laid for it.

Mr. Davis: Asking for a matter of direct knowledge.

Mr. Boyle: I move that the answer be stricken.

Mr. Fryberger: He can tell what he saw.

Mr. Davis, I know, but I am asking for direct knowledge.

Mr. Boyle: He can tell, if he knows anything about it, what the conditions were.

Mr. Fryberger: What he saw.

Mr. Boyle: But this is a mere conclusion that he is asking for.

Mr. Fryberger: May it please the court, it is for the jury [fol. 39] to say what caused it. He can tell what he saw and it is for the jury, as I understand the rule.

The Court: It would only be his opinion.

Mr. Fryberger: Yes.

Mr. Davis: No, I am asking about his knowledge, what he saw, what he knew from his own knowledge, as a practical railroad man, what caused that car to go off the track. It is for the jury to weigh the testimony, of course.

Mr. Fryberger: Yes, but may it please the court, as I understand the rule, the witness may state what he saw and what he heard and then it is for the jury to say what the result was.

Mr. Davis: Well, we withdraw it, anyway.

Q. I will ask this: As you sat there, did you notice where the car had left the track or any marks on the ice?

A. Yes, sir.

Q. Or rails. Did you notice the condition there?

A. Yes, sir.

Q. Was there any ice on the rail?

A. Yes, sir.

Mr. Boyle: This is objected to as being leading and suggestive and I submit that we are down to a point where if the witness is going to testify as to conditions existing there we ought to get his testimony on that, not the testimony of counsel.

Mr. Davis: Very well. I have asked him the question whether there was any ice on the rail. He could answer that yes or no.

[fol. 40] The Court: That is suggestive. Very well.

Mr. Davis: Very well. Tell the jury.

The Court: The witness may answer this question and I suggest from now on you be careful not to ask leading questions.

Mr. Davis: I will try and do that.

Q. Mr. Moquin, just describe the condition of the track or the rails there where the car left the track, just tell the jury.

A. Well, the track was—I was about four or five feet from it and I could see where the wheel made a clean cut through this soft snow and then I could see where it cut through the ice to the ball of the rail.

Q. About how high was this ice above the ball of the rail?

A. Oh, maybe an inch.

Q. Yes. Describe the ice to the jury.

A. Well, it was ice, kind of dirty ice; seemed as though it had been there for some time.

Mr. Boyle: I move the last part of that answer be stricken, of your Honor please, as a mere conclusion of this witness.

The Court: It may be stricken.

Mr. Boyle: Without any proper foundation for it.

Mr. Davis:

Q. Well, state to the jury whether it was all one piece of ice or not.

A. No, it looked as though it cut through kind of layers of ice.

Q. What do you mean by layers?

[fol. 41] A. As though it had been accumulating there.

Q. Yes. Well, now, Mr. Moquin, about how far, in your best judgment, to the east of this crossing was it where you were thrown from the car?

A. Well, I would say about 150 feet from the crossing.

Q. Do you recollect whether you were east or west of the depot?

A. We were east of the depot.

Q. Where you were thrown off?

A. Yes, sir.

Q. Prior to the time you were thrown off as they were backing these two cars and the engine back on this house track, had you experienced, until that car went off the track, any difficulty as you came through the snow?

A. No, sir.

Q. And how did this car go off the track, gradually or suddenly?

A. Went off just like a shot.

Q. Suddenly. How were you thrown from the car, gradually, or suddenly?

A. Suddenly.

Q. You are a man of about what weight?

A. I weighed 212 at that time.

Q. You weighed 212 pounds at that time. And what weight are you now?

A. The last time I was weighed I was 182.

Q. While you were on that car after the flanging operation had been performed by that engineer, where was this car of ties going to be taken?

A. It was going in the train and going to be peddled from [fol. 42] there to Markville.

Q. Did you have any work with reference to this car of ties after you pulled out from this house track?

A. Yes, after we got the flanging through I stayed up there to assist with the switching. We had to throw this car of ties out; then I was going to ride the empty in and down and the engineer was going to flange out the passing track.

Q. Was that flanging operation any part of your work there?

A. No, sir.

Q. If you had backed up to the east end of this house track and the flanging operation had been performed but for this accident, then where would the car of ties be taken to?

A. It would go in our train.

Q. On to the main line?

A. On to the main line.

Q. Then, would you have to ride that car of ties or anything to do with either releasing or setting the brakes on that car of ties?

A. Well, we hardly ever ride them, but I would have to ride the empty back on the house and then they would go back on the passing to flange.

Q. Well, as I understand, had the flanging operation been completed you would put the car of ties into the train on the main line track?

A. Yes, sir.

Q. Then you would push the empty back on the house track?

A. Yes, sir.

[fol. 43] Q. Now, whose duty would it be to set that brake on that empty?

A. My duty to ride it in there.

Q. And did you have any duty with reference to the flanging operation of either of those tracks?

A. No, sir.

Q. As you were lying there and were thrown from the ground, you may state to the jury what injury you sustained to yourself.

A. Well, my both legs were awful numb, just as though they were in a cake of ice, I thought.

Q. Mr. Moquin, at the time that you went over to this car of ties, where did you go from—the depot?

A. Yes, sir.

Q. And when you walked over there, did you walk over snow?

A. Yes, sir.

Q. What was the condition of that snow as you walked over it?

A. Oh, just ordinary, soft snow.

Q. Did your feet go into the snow or did you walk on it? Did it hold you up?

A. No, my feet sunk in three or four inches.

Q. And when you got over there you got on top of the car of ties?

A. Yes, sir.

Q. And when the coupling was made with the empty car to the car of ties, what signal, if any, did you give to Mr. Dan, or whatever his name was, the other brakeman?

A. Before we coupled on the car he was standing on the [fol. 44] foot board giving the sign.

Q. What did that sign mean?

A. That meant that we were going to shove back.

Q. And after you started to shove back, where did Dan go?

A. Came up on the car where I was.

Q. And when he came up there, you may state whether or not what the conductor had told you——

A. Yes, sir.

Mr. Boyle: This is objected to as leading and suggestive, your Honor.

Mr. Fryberger: And hearsay.

Mr. Davis: Well, tell what you said to Dan.

A. I told Dan——

Mr. Boyle: We object as hearsay, if your Honor please. In the first place I was objecting to the form of the question, but we also object to this as being pure hearsay.

The Court: The question calls for the conversation with another.

Mr. Davis: With the brakeman to whom the conductor had told him to convey a message.

The Court: The witness may answer.

(Defendant excepts.)

Mr. Davis:

Q. Tell the jury what you said to Dan.

A. When Dan got up on the car I told him that the conductor told me to tell him that we should shove back on the house track and flange that out and go up to the other end and do our switching and back down the passing and flange that out.

[fol. 45] Q. At the time that you went back and they started to shove these cars with the engine from the west end of the house track back over the Main street crossing, did the cars and the engine plow through that snow without any difficulty?

A. Yes, sir.

Q. And plowed over the crossing until you struck the ice about 150 feet to the east of the crossing?

A. Yes, sir.

Q. Did you know at the time you were backing up there or had anybody ever notified you that there was any ice over those rails?

A. No, sir.

Q. During the sixteen or eighteen or twenty years of your experience as a brakeman, have you had experience and made observation of whether or not ice over the rails will cause a car to derail?

A. Yes, sir.

Q. Do you know whether it will or not?

A. Yes, sir.

Q. Will it?

A. Yes, sir.

Q. You noticed the ice and the condition of the ice that day there?

A. Yes, sir.

Q. I will ask you, as a practical railroad man, if there was ice upon the rails of sufficient strength to cause a derailment?

A. Yes, sir.

Mr. Boyle: Just a minute. Objected to as calling for a [fol. 46] conclusion of the witness, no proper foundation

laid, incompetent, irrelevant and immaterial and I move that the answer be stricken.

The Court: The answer may be stricken for the purpose of the objection. The objection is overruled and the answer may stand. It is from his experience.

(Exception by defendant.)

Mr. Davis: And in your opinion, is that what caused this care to derail?

A. Yes, sir.

Mr. Boyle: The same objection as last above, if your Honor please.

The Court: Yes.

(Exception by defendant.)

Mr. Davis: And do you know of any other thing that could have caused that car to derail that day, other than that ice over the rail, from your experience as a railroad man?

A. No, sir.

Mr. Boyle: The same objection as last above.

Mr. Fryberger: Every one of these questions are answered before we get in our objections.

The Court: Well, the record will show that the objection is before the answer. You have a right to have your objection before an answer is made. The same ruling.

(Exception by defendant.)

Mr. Davis:

Q. Do you know of anything else that would cause that car to derail, other than the ice?

A. No, sir.

Q. Now, had the section men or the conductor or the [fol. 47] train master, anybody, notified you that there was ice on that track?

Mr. Boyle: Just a minute.

A. No, sir.

Mr. Davis: Just wait.

Mr. Boyle: This is objected to as incompetent, irrelevant and immaterial.

The Court: The same ruling.

(Exception by defendant.)

Mr. Davis: You say they had not?

A. No, sir.

Q. Mr. Moquin, do you know, from your experience as a practical railroad man, if you had been notified that there was ice on that track what your duty would be?

Mr. Fryberger: That is objected to as calling for mere argument and conclusion.

The Court: Objection sustained.

(Exception by plaintiff.)

Q. Do you know, from your experience as a practical railroad man, where there is ice over the rails, what the usual, proper and customary course would be to take in backing cars over that ice or through the ice?

Mr. Boyle: The same objection, incompetent, irrelevant and immaterial and no proper foundation laid for it.

The Court: Objection overruled.

(Exception by defendant.)

Mr. Davis:

Q. What would be the thing for you to do if you knew there was ice on that track?

[fol. 48] A. Wouldn't back them over.

Q. Why?

A. They would derail.

Q. You know that from your experience as a practical railroad man?

A. Yes, sir.

Q. You have been a railroad man for about twenty years?

A. Yes, sir.

Q. And had had experience in backing boxcars through snow drifts from eight to ten inches high?

A. Many of them five feet high.

Q. Where the snow wasn't packed?

A. Yes, sir.

Q. And in all your experience, did you ever encounter any difficulty in that operation?

Mr. Fryberger: Just a minute. That is objected to as calling for mere argument, conclusion. The question we are trying is what happened on this day.

Mr. Davis: Goes to his knowledge and his experience.

Mr. Fryberger: Of course, we all know, your Honor, that there may be a hundred different things that will derail a car. The fact he didn't know it——

The Court: The witness may answer this question.

Mr. Fryberger: Exception.

Mr. Davis:

Q. In all your experience did you ever know, backing over snow as you backed over it that day, of cars being derailed by that snow?

[fol. 49] A. No, sir.

Q. And you had done it many times during all the years you had worked?

A. Yes, sir.

Q. After you were thrown from that car, I wish you would tell the jury what injuries you sustained, what happened to you when you were thrown from the top of the car.

A. Well, I didn't know what was happening to me when I was first throwed off the car.

Q. How did you land?

A. I landed on my both feet and fell back on my back and my right arm.

Q. Were your feet injured?

A. Yes, sir.

Q. In what way?

A. My right leg was broke in seven places and my left foot, some little bones broken near the little toe and my left heel is jammed awful bad, still awful sore.

Q. Did you sustain any injury to your back?

A. My back was hurt. There was a big spot, as big as your hand, at the lower end of my spine.

Q. Was that painful?

A. Yes, sir.

Q. You sustained some injury to your arm; where was that? Just show that to the jury.

A. Hurt the nerves in my arm so these two fingers are partly paralyzed. I have got hardly any muscle power.

Q. You were taken to the hospital at Superior that night?

[fol. 50] A. Yes, sir.

Q. You remained in the hospital how long?

A. Three weeks.

Q. Under whose care?

A. Dr. Schnell.

Q. I wish you would tell the jury during all that time whether you suffered pain in your feet and in your back.

A. Yes, the first six nights I was in the hospital I never slept at all.

Q. Why?

A. Awful pain, especially in my legs and my back. These two fingers were buzzing, kind of throbbing all the time.

Q. Was anything done to assist you in sleeping or to help you relieve the pain?

A. Yes, I got some—they gave me some hypodermics, but they didn't seem to take any effect.

Q. You remained in the hospital how long?

A. Three weeks.

Q. During all of that time did you suffer pain?

A. Yes, sir.

Q. You left the hospital, then, about three weeks after the accident?

A. Yes, sir.

Q. You went to your home in Superior?

A. Yes, sir.

Q. You are living at home with your wife?

A. Yes, sir.

Q. From the time you left the hospital up to the present time, I will ask you whether or not you have suffered pain in those feet?

[fol. 51] A. Yes, I have always had pain. I got pain all the time.

Q. Describe that to the jury.

A. Well, my right ankle got sharp, shooting pains if I put any pressure on it at all. My left heel is sore as a boil all the time. I have got to pad my feet in order to walk.

Q. Have you suffered pain in your back, the small of your back?

A. I have always got to sit forward this way. I can't bend back.

Q. Why?

A. It hurts my spine.

Q. If you sit on a hard substance, how does it affect you?

A. It hurts me right now sitting on this chair.

Q. Just describe it to the jury.

A. Just a sharp pain, kind of sharp pain in my spine.

Q. Has that pain been with you ever since you met with this accident?

A. Yes, sir.

Q. Did you ever have that before?

A. No, sir.

Q. Before you were hurt were you able to do your regular work as a railroad man?

A. Yes, sir.

Q. I believe you were injured some four or five years before?

A. Yes, sir.

Q. And had you recovered from that injury?

A. Yes, sir.

[fol. 52] Q. Did it in any way impair your work as a brakeman?

A. No, sir.

Q. How many years previous to this accident of February 27, 1928, since you had recovered from this previous accident?

A. Four years.

Q. During those four years had you worked regularly as a brakeman?

A. Yes, sir.

Q. Were you able to walk out normally?

A. Yes, sir.

Q. Stand on your feet and put your weight on them?

A. Yes, sir.

Q. Since this accident have you ever been able to put your weight on your two feet without assistance?

A. No, sir.

Q. In what way does it affect you?

A. Pains me when I put my weight on there.

Q. When you were at the hospital and for some time after you left the hospital, how did you move about?

A. Well, I had a cast on my leg a long time after I went home.

Q. In other words, something was put around your leg?

A. Yes, sir.

Q. When was that removed?

A. It was removed about six or seven weeks after I got home.

[fol. 53] Q. During all of that time, how did you move about?

A. With crutches.

Q. Two crutches?

A. Very little on crutches. I couldn't hardly stand on my left foot.

Q. Yes, but you moved about with crutches?

A. Yes, sir.

Q. Later on you discarded the crutches?

A. Yes, sir.

Q. I notice you carry a cane, does that help you in walking?

A. It helps me. I can walk without a cane.

Q. Have you tried to walk without a cane?

A. Yes, sir.

Q. What effect did it have on you?

A. Well, it pains me. The cane relieves the weight on my legs and my back seems to feel better with a cane.

Q. Does it assist you in moving about?

A. Yes, sir.

Q. During all this time when you have moved about with a cane, have you suffered pain in your feet?

A. Yes, sir.

Q. Do you still suffer pain in your feet?

A. Yes, sir.

Q. After this accident and when you were able to be home, did you have any difficulty in the movement of your bowels?

A. Yes, sir.

Q. In what way?

[fol. 54] A. Why, it seemed to be extremes both ways. I had to be awful careful what I ate. If I was too constipated I would pass blood.

Q. Did you pass blood?

A. Yes, sir.

Q. To what extent?

A. Oh, enough so you could see it plainly.

Q. How frequently?

A. Well, that was just when I was constipated, of course.

Q. What other difficulty have you experienced with your bowels?

A. Well, when—the extreme the other way; I can't seem to control them.

Q. You have had loss of control of your bowels?

A. Yes, sir.

Q. And has that bothered you since this accident?

A. Yes, sir.

Q. Did that ever bother you before?

A. No, sir.

Q. You sustained an injury to your right arm, I believe, that day?

A. Yes, sir.

Q. How does that affect you now?

A. Them fingers, they buzz all the time.

Q. What do you mean by buzz—numb—or——

A. Kind of buzzing.

Q. Is it a burning feeling?

A. Buzzing, burning feeling all the time and I got very little muscle power in them two fingers.

[fol. 55] Q. Have you rubbed them and tried to get them well?

A. Yes, sir.

Q. With reference to your back, what have you done there in trying to remedy the condition of your back?

A. Well, there is nights if I happen to be laying a certain way it wakes me up.

Q. What wakes you up?

A. Pain in my back.

Q. Describe that pain to the jury.

A. Well, it is sharp pain in my lower spine.

Q. What have you had done for that, when your back hurts you?

A. Well, my wife got some liniment from my family doctor and my wife rubbed me.

Q. About how often would you say since this accident, per week, has your wife rubbed your back to relieve the pain?

A. Oh, two to three times a week.

Q. With reference to your leg, what have you done towards trying to improve them?

A. We got a liniment from the same doctor and we used it and olive oil for my leg.

Q. Who rubs your leg?

A. Mrs. Moquin.

Q. How frequently would you say since this accident, up to the present time, has your wife rubbed your leg?

A. Practically every night.

Q. Every night since this accident?

A. Yes, sir.

[fol. 56] Q. Have you done everything in your power to try and get well, so as to get back on your feet and to work?

A. Yes, sir.

Q. Have you walked about some distance?

A. Yes, I have walked from my house down town, my wife and I.

Q. What effect does that have on you?

A. Well, of course, I have to rest. My legs get awful shaky.

Q. What do you mean by rest?

A. Well, just stop.

Q. In walking about are you able to walk as you normally could before?

A. No, sir.

Q. Or have you ever been able to since this accident?

A. No, sir.

Q. Have you tried to the best of your ability to do so?

A. Yes, sir, I have.

Q. And have you ever been able to walk without pain?

A. No, sir.

Q. Or to put the weight of your body on your feet without pain?

A. No, sir.

Q. During the period of about fifteen to sixteen months since you have been injured has that pain been in your legs all the time?

A. Yes, sir.

Mr. Boyle: This is objected to as leading and sugges-
[fol. 57] tive, your Honor. I think the witness is intelligent enough to tell how the injury has affected him.

The Court: I suggest that counsel refrain from leading question as much as possible.

Mr. Davis: Very well, your Honor.

Q. During the past fifteen or sixteen months tell the jury with reference to your feet, what you have done and how they have affected you as to pain or otherwise.

A. Well, they pain me all the time. That is, so there is times when I am sitting still when I have to get up, I am awful stiff. They pain me all the time whenever I put my weight on them. I can walk without a cane. I have tried it, but a cane relieves me an awful lot, takes the weight off my legs and back.

Q. In walking up-stairs have you noticed any difference between walking up-stairs now and before you were hurt?

A. Why, yes, I have to walk up-stairs one step at a time.

Q. What do you mean by one step at a time?

A. I have to raise this foot up and then bring the other one up with the weight on my cane.

Q. To the same step?

A. Yes, sir.

Q. Before you were hurt how would you walk up the steps?

A. Well, I would go up as fast as anyone.

Q. Would you go up one foot on one step and the next on the next above and so forth?

[fol. 58] A. Yes, sir.

Q. Have you been able to do that since you were hurt?

A. No, sir.

Q. Before you were hurt, were you in good health?

A. Yes, sir.

Q. Had you had any bleeding of the bowel before you were hurt?

A. No, sir.

Q. Any pain or injury to your spine before you were hurt?

A. No, sir.

Q. For four years previous to the accident had you had any difficulty in walking?

A. No, sir.

Q. Were you able to walk rapidly?

A. Yes, sir.

Q. Able to climb stairs?
A. Yes, sir.
Q. Climb boxcars?
A. Yes, sir.
Q. And do the general work of a brakeman?
A. Yes, sir.
Q. Can you walk as fast now as you could before?
A. No, sir.

Mr. Davis: Mr. Boyle, you have the 1912 rules of the company and I would like to ask you if you will produce them.

Mr. Boyle: Yes, I have those rules.

Mr. Davis: You may cross examine. I might say I want [fol. 59] to ask Mr. Moquin some questions in relation to the rules later, on re-direct.

Mr. Boyle: Mr. Davis, you asked for only the 1912 rules. As I understand it, there are additional rules contained in time tables that are issued.

Mr. Davis: Well, if you will let me have them I will appreciate it.

Mr. Boyle: And the time table that I have here, No. 3, was not in effect at the time of the accident. As I understand it, No. 2 contains the rules in effect at that time.

Cross-examination.

By Mr. Boyle:

Q. When was it that you went to work for the Soo Line?
A. June 10, 1910.
Q. Did you go to work as a brakeman at that time?
A. Yes, sir.
Q. Then, you continued your work as a brakeman at what place?
A. Minneapolis.
Q. You were living in Minneapolis at that time?
A. Yes, sir.
Q. When did you move to Superior?
A. 1912, in July.
Q. Two years after you went to work for the company?
A. Well, it was in July, 1912, yes, sir.
Q. And is it a fact that you were promoted to the posi- [fol. 60] tion of conductor?

A. Yes, sir.

Q. When did you get that promotion?

A. 1920.

Q. That was eight years before this accident in which you were injured?

A. Yes, sir.

Q. After you were promoted to the position of conductor, did you take charge of some of the trains of the Soo Line?

A. Yes, in the eight years I was a conductor and ran a train one month, altogether.

Q. But that was merely on account of senior rights in the service, I suppose?

A. I suppose, yes, sir.

Q. Well, that is true, isn't it?

A. Yes, sir.

Q. The fact is that if the business of the company had been large enough to require more conductors you would have held your position as conductor?

A. Yes, sir.

Q. But as the business drops off and the conductors are not needed, then you men go back and work as brakemen, as I understand it?

A. Yes, sir.

Q. And that was true in your case?

A. Yes, sir.

Q. On this particular run on which you were injured, were you there for sixteen years, did you say?

[fol. 61] A. Practically sixteen years on that run, yes, sir.

Q. You were running over that same route, then, during a great deal of the time that you were working for the Soo Line?

A. Yes, sir.

Q. What kind of trains did you work on?

A. Way-freight.

Q. During all of that period?

A. Yes, sir.

Q. You took care of whatever switching was to be done throughout that period, whatever switching was to be done by the way-freight?

A. No, sir.

Q. I mean at these smaller stations?

A. No, I never took charge of the switching.

Q. The crew on this way-freight that you were working on did the switching at these smaller points?

A. Yes, sir.

Q. That is what I mean, you don't have any special crew for switching or anything of that kind?

A. No, sir.

Q. What position did you have as brakeman, head brakeman or rear brakeman?

A. I guess I held them all, head brakeman and hind brakeman and swing. There were three brakeman on that job for a while and then two brakemen.

Q. There was a swing brakeman there, wasn't there?

A. There was a swing brakeman left Dresser and came [fol. 62] till he met us.

Q. So that on a part of the trip there were three brakemen in the crew and on a part of the trip two brakemen?

A. Yes, sir.

Q. The day of the accident what position did you have?

A. I was rear brakeman.

Q. Who was the front brakeman on the train?

A. Dan Carr.

Q. So that Dan Carr is the man who was working next to the engine?

A. Yes, sir.

Q. That is what you mean by the front brakeman, isn't it?

A. Dan Carr was doing the swing work.

Q. He had what is known as the switch list, didn't he?

A. Yes, sir.

Q. He had in that position charge of the switching operations, did he?

A. Yes, sir.

Q. Who was the senior between you and Mr. Carr?

A. I was.

Q. That is, you were the oldest man in the service?

A. Yes, sir.

Q. When you pulled into the station of Cloverton you were riding at what place on the train?

A. The caboose.

[fol. 63] Q. Did you remain in the caboose until the train stopped?

A. Yes, sir.

Q. Was anybody else in the caboose at that time?

A. I don't remember.

Q. Mr. Carr wasn't in the caboose at that time?

A. I don't remember where he was.

Q. When the trained stopped for the Cloverton station where was the caboose with reference to the depot?

A. Well, it would be right about the depot, right about opposite the depot.

Q. You had some little freight to unload there at Cloverton, did you?

A. Yes, sir.

Q. Did you do that work?

A. Yes, sir.

Q. Did anybody help you do it?

A. Yes, sir.

Q. Who was that?

A. I don't remember who helped me.

Q. Then did you pull up to clear the crossing after you had unloaded your freight?

A. Yes, sir.

Q. Are you sure you unloaded freight there that day?

A. I am pretty sure that we did.

Q. You are not exactly positive about it apparently?

A. Yes, sir, I am.

Q. Then after you unloaded the freight, or at any rate [fol. 64] after the train had stopped there, you pulled up and cleared the crossing?

A. Yes, sir.

Q. Did you ride on the train as it pulled up to clear the crossing?

A. No, I did not.

Q. When you got out of the caboose, then, as the train stopped for the Cloverton station——

A. Yes, sir.

Q. —you didn't get back onto the train again?

A. I didn't get back on the caboose, no, sir.

Q. You didn't get back on any part of the train after that before the accident?

A. No, sir.

Q. After the train was pulled up to clear the crossing where did you go?

A. I went over and stood on the crossing there till the conductor came from the depot and we was late so—some-

times they won't flange if it is late and I asked him if he wanted it flanged. "Yes," he says, "tell Dan to go back down to the house——"

Q. I asked you where was the next place you went.

Mr. Boyle: I move that that last be stricken as not responsive to my question.

The Court: The last part of the answer may be stricken as not responsive.

(Exception by plaintiff.)

Mr. Boyle:

Q. You stayed on the crossing until the conductor came from the depot, you say?

A. I walked over to the crossing.

[fol. 65] Q. What crossing do you have reference to now?

A. That main crossing. It is right close to the depot.

Q. Did you walk up to the crossing from the depot after the train had pulled up to clear the crossing?

A. Sure, the caboose was right at the crossing, just over the crossing.

Q. But the caboose, as I understand it, stopped in the first place back here at the depot?

A. Yes, sir.

Q. Then as the train started up the train went up so that the caboose would clear the crossing?

A. Just to clear it, yes.

Q. That is what you mean by clearing the crossing?

A. Yes, sir.

Q. Pull the train up so that the traffic could go over the track?

A. Yes, sir.

Q. And there wouldn't be any obstruction on the crossing?

A. Yes, sir.

Q. Where was the conductor then while you were walking up to the crossing?

A. In the depot.

Q. You waited there at the crossing then, did you?

A. Yes, sir.

Q. Did you wait there on the main track or did you go over to the passing track or the house track?

A. I waited right there on the main track or between the [fol. 66] passing track and the main line because I wanted to ask him about this flanging.

Q. Then you went over to the house track, did you?

A. Walked over to where the car of ties was, yes, sir.

Q. Did you make any inspection of this snow along the house track at the place where the car was later derailed?

A. No, sir.

Q. Then when you got over to the house track you walked up to where that car of ties was on the house track?

A. Yes, sir.

Q. How far was that from the crossing?

A. Just to clear the crossing.

Q. Give us your best estimate in feet or box car lengths?

A. Oh, it may have been a car length from the sidewalk.

Q. Is there a sidewalk across the tracks at that point?

A. Yes, sir.

Q. You think that the car of ties was perhaps a car length from the crossing?

A. Yes, sir.

Q. That would be in a southerly direction or, as you men say, west of the crossing?

A. West of the crossing.

Q. In railway parlance?

A. Yes, sir.

[fol. 67] Q. You say that the engine was coming back on the house track?

A. Yes, sir.

Q. Then when you went up to that car of ties you climbed on top did you?

A. Went up on top to let the brake off, yes, sir.

Q. And remained there until after the car was de-railed and you were thrown from the car?

A. Yes, sir.

Q. How far do you think it was from the crossing to the place where the car was de-railed and you were thrown from the car?

A. Well, I should judge it was about 150 feet.

Q. And you were thrown off on the depot side?

A. Yes, sir.

Q. How long were you in the hospital after you were taken to Superior?

A. Three weeks.

Q. There was a cast on your leg during that time?
A. Both of them.
Q. How long did you keep the cast on your leg?
A. Gee, I thought it was about six weeks.
Q. You went to your home——
A. Yes, sir.
Q. —before the cast was removed?
A. Yes, they carried me home.
Q. How long after the accident was it when you started to get up on your feet and move around on your feet?
A. Oh, I could step on my left foot a little, oh, four weeks, five weeks, afterwards.
[fol. 68] Q. You started using crutches then?
A. Crutches a little bit.
Q. As time went on you got so you could stand on them a little better?
A. Yes, sir.
Q. And finally got so you could use canes instead of crutches?
A. Yes, sir.
Q. The other members of the crew came to your assistance there almost immediately after you fell, didn't they?
A. Yes, sir.
Q. And carried you from the point or place where you were lying over to the depot?
A. Yes, sir.
Q. From there you were taken down to the next station, Markville?
A. Yes, sir.
Q. Did you say that you were dazed when you fell from the car?
A. I was dazed for a minute or so.
Q. Were you suffering any pain then?
A. Well, my legs were numb, knocked all the blood out of them.
Q. Felt like the blood had gone from your legs?
A. Felt as though they were gone.
Q. Did you know that your leg was broken while you were lying there on the ground?
A. Certainly, I tried to stand up and couldn't.
Q. So that you knew your leg was broken at that time?
A. Yes, sir, I thought it was. I didn't know.

[fol. 69] Q. And then in a very short time the other members of the crew came along there and carried you over to the depot?

A. Yes, sir.

Redirect examination.

By Mr. Davis:

Q. This ice which you saw over the rails, what was its condition as to being hard or soft ice?

Mr. Boyle: Now, wait a minute.

A. Hard ice.

Mr. Boyle: Wait a minute. I move that the answer be stricken.

Mr. Davis: Just wait until they object.

The Court: You must please bear that in mind and when you are asked a question wait long enough so counsel will have an opportunity to make an objection.

Mr. Davis: Now, I will repeat the question, but don't answer until counsel have an opportunity to object. The ice that you saw over the top of the rails can you state to the jury whether it was hard or soft ice?

Mr. Boyle: Now, if your Honor please, this is objected to as mere repetition, not re-direct.

The Court: Objection overruled.

(Exception by defendant.)

Mr. Boyle: The matter was covered fully in the examination.

The Court: Counsel would be able to recall the witness. I will overrule the objection. He may answer.

[fol. 70] (Exception by defendant.)

Mr. Davis:

Q. What was that ice, hard or soft ice?

A. Hard ice.

Q. From your experience have you seen ice on rails before?

A. Yes, sir.

Mr. Boyle: The same objection, if your Honor please.
The Court: Objection overruled.

(Exception by defendant.)

Mr. Boyle: Our point is we understood that the counsel had finished with his examination and we did not want to take up a matter on cross examination until he had finished. Now apparently counsel is going over the entire story again.

Mr. Davis: Oh, I think not, your Honor. I am covering some points which I think I omitted on direct.

Mr. Boyle: It was all gone over before.

The Court: You had not finished your question. From your experience, had you seen ice——

Mr. Davis: On rails before.

Mr. Boyle: This is objected to as mere repetition, not re-direct examination incompetent, irrelevant and immaterial.

The Court: That question is repetition.

(Exception by plaintiff.)

Mr. Davis: Are you able to state from your experience in observing ice on rails whether or not that ice had been there some length of time?

Mr. Boyle: This is objected to as incompetent, irrelevant [fol. 71] and immaterial, calling for a conclusion, not proper re-direct and as mere repetition.

The Court: Objection sustained.

Mr. Davis: Exception.

Q. You were on the ground, were you, when the engineer and fireman came back, lying on the ground or sitting on the ground?

A. Lying.

Mr. Boyle: The same objection, if the court please.
The Court: Objection overruled.

(Exception by defendant.)

Mr. Davis: When you were there you may state to the court and jury whether or not the engineer and fireman looked around to see what caused the derailment.

Mr. Boyle: Now, this is objected to as not proper re-direct examination, mere repetition, incompetent, irrelevant and immaterial.

The Court: Objection overruled.

(Exception by defendant.)

Mr. Davis:

Q. Did the engineer and fireman look around to see what caused the derailment?

A. Yes, sir.

Q. And you were lying on the ground then?

A. Yes, sir.

Q. And was it while they were there and after they were there that you saw this ice on the rail?

Mr. Boyle: The same objection to this question. We submit, your Honor, that it was all covered in the direct [fol. 72] examination and this is not proper re-direct. It is mere repetition.

The Court: Mr. Reporter, will you read the last question?

(Last question read.)

The Court: Sustained on the ground that it is repetition. I am very sure that question was asked.

Q. Well, how long would you say you were on the ground there, about how many minutes, before they carried you away?

Mr. Boyle: Well, that is objected to as repetition. That was all covered.

Mr. Davis: No, I think not.

The Court: Objection overruled.

(Exception by defendant.)

A. Oh, I should judge ten minutes.

(Witness excused.)

Mrs. Marion Larson, called on behalf of plaintiff, duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Where do you live?

A. Danbury, Wisconsin.

Q. Do you know how far that is from Cloverton?
A. It is about twenty miles, I would judge.
Q. What does your husband do?
A. He is postmaster.
Q. Do you work as weather observer at Danbury, Wisconsin?
A. Yes, sir, I am government weather observer there.
[fol. 73] Q. Were you in February, 1928?
A. Yes, sir.
Q. Did you during the month of February, 1928, keep a record of the weather conditions, showing the precipitation, the amount of rain or snow that fell, and the temperature at Danbury, Wisconsin?
A. Yes, sir.
Q. Have you that record with you?
A. Yes, sir.
Q. Is that a record that you made and kept as an official government weather observer?
A. Yes, sir.
Q. Who do you work under directly?
A. I send my reports to Milwaukee, Wisconsin.
Q. To the weather observer there?
A. Yes, sir.
Q. Have you the weather reports of your observations?
A. Yes, sir.
Q. Made in your handwriting?
A. Yes, sir.
Q. Have you gone over them?
A. Yes, sir.
Q. Referring particularly to the 7th day of February, 1928, you may state whether your reports show that there was any fall of rain?
A. There was one-half inch of rainfall.
Q. Was there any rain or snow that fell from that time until the 13th of February?
A. No, there wasn't.
Q. On the 13th was there any snow or rainfall?
A. There were two inches of snow fall.
[fol. 74] Q. Do you know what the temperature was on the 7th of February?
A. The maximum temperature was 42 degrees and the minimum temperature was 29 degrees.
Q. On the 13th what was the maximum and minimum?

A. The maximum temperature on the 13th was 36 degrees and and the minimum was 10 degrees. Above zero.

Q. Coming down to the 21st day of February, was there any snow fall?

A. There were two inches of snow fall.

Q. What were your maximum and minimum temperatures on that day?

A. The maximum was 26 above zero and the minimum was 15 below zero.

Q. What is the freezing point?

A. Freezing point is 32 above.

Q. So if it is above 32 it melts and if it is below 32 it freezes?

A. Yes.

Q. On the 22nd of February what were the maximum and minimum temperatures?

A. The 22nd was 23 above zero and 17 below zero.

Q. Was there any snow fall on the 22nd?

A. There were five inches of snow fall during the night.

Q. That is the 22nd?

A. Yes, sir.

Q. From that day up to the 27th does your record show any snow fall whatsoever?

[fol. 75] A. No, it does not.

Q. Take the 23rd of February, the day following the five inches of snow fall, what were the maximum and minimum temperatures?

A. Maximum 23 and the minimum was 17 below.

Q. The 24th, what was the maximum and what was the minimum?

A. The maxium was 2 above and the minimum was 17 below.

Q. The 25th?

A. The 25th the maximum was 19 above and the minimum was 39 below.

Q. The 26th?

A. On the 26th the maximum was 36 and the minimum was 11.

Q. That is above?

A. Above.

Q. Now, 36 above is above the freezing point, is it?

A. Yes, sir.

Q. On the 27th what were the maximum and minimum?

A. 39 above and 7 below.

Q. With reference to the 26th and 27th have you a record as to whether the day was clear or not those two days?

A. They were clear.

Cross-examination.

By Mr. Boyle:

Q. Do you have any record of what particular time of [fol. 76] the day it was warm or cold or do you merely have the maximum and the minimum for the day?

A. Why, the maximum and the minimum of the 24 hours.

Q. Throughout the 24 hours?

A. Throughout the 24 hours.

Q. You couldn't tell us whether it was cold in the morning and warm in the afternoon or warm in the morning and cold in the afternoon?

A. Well, of course, the maximum would tell you how high the temperature had went in the day.

Q. You would know from your record that sometime during the 24 hours, for instance, on February 27th, the temperature had gone up to 39 degrees above?

A. Yes.

Q. You would not know whether that was in the morning or in the afternoon?

A. Well, you would naturally know it was about noon it would get the warmest.

Q. That might be true, generally speaking, but sometimes it also gets a little colder at noon. What I am trying to get at is whether or not your records disclose just what part of the day was warm and what part was cold?

A. No, it doesn't. It shows the warmest and coldest.

[fol. 77] Noah Moquin, plaintiff, re-called in his own behalf, testified as follows:

Direct examination.

By Mr. Davis:

Q. What average salary had you earned per month for the last two or three years before your injury?

Mr. Boyle: Mr. Davis, I have the figures showing the exact amount of the payments and I think perhaps we can agree to that.

Mr. Davis: I think it amounts to a little better than $250.00. We figured it up the other day.

Mr. Boyle: I have the exact figures on that and I understand from the accounting department that they are correct.

Mr. Davis: We offer in evidence the records which show that during the year 1926 Mr. Moquin earned $3,103.14; that during the year 1927, Mr. Moquin earned $2,826.91; that in the first half of January, 1928, Mr. Moquin earned $98.41 and in the second half $148.91; that in the first half of February, 1928, Mr. Moquin earned $144.96 and in the second half that he earned $111.46 up to the 27th of February when he was injured.

Mr. Boyle: Yes there is no question about that.

The Court: And that is consented to by the defendant?

Mr. Boyle: Yes.

[fol. 78] Mrs. HILMA MOQUIN, called on behalf of plaintiff, duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. You are the wife of Noah Moquin, the plaintiff?

A. Yes, sir.

Q. Were you living with him at Superior at the time he was hurt?

A. Yes, sir.

Q. On the 27th day of February, 1928, did you receive notice of his injury?

A. Yes, sir.

Q. Whether you went to the depot to meet him?

A. I did. I went to the depot.

Q. When he arrived at the depot where was he?

A. He was in the caboose, I think.

Q. Was he taken out of the caboose?

A. He was taken on a cot out of the caboose.

Q. Where was he taken to?

A. He was put in the ambulance.

Q. And taken where?
A. To St. Mary's Hospital.
Q. Did you go to the hospital?
A. Yes, sir.
Q. Who with?
A. With the doctor.
Q. What doctor?
A. Dr. Schnell.
Q. Dr. Schnell, who is the Soo Line doctor at Superior?
[fol. 79] A. Yes, sir.
Q. Did you see your husband that afternoon or evening at the hospital?
A. Yes, sir.
Q. Did you notice yhether or not he complained or did you hear him complain of pain that afternoon?
A. He did.
Q. Did you see his legs?
A. Yes, sir.
Q. What was their condition? Just describe them briefly to the jury.
A. Well, they were considerably swollen and seemed to be kind of blue like in the heel and instep and the right leg was broke.
Q. Did you see him practically daily during the time he was in the hospital?
A. I did.
Q. About how much of the time would you spend with him each day?
A. Well, the first three weeks I went there about three times a week—or three times a day and——
Q. He was there about three weeks, was he not?
A. Yes, sir.
Q. Then he went home?
A. Yes, sir.
Q. When he came home did you help take care of him?
A. I did.
Q. Were his feet in a cast when he came home?
A. They were.
[fol. 80] Q. About how long after he was home before those casts were removed?
A. I would judge about six weeks or so.
Q. During the time that he was home did you observe him as to trying to stand on his feet or trying to walk?
A. I did.

Q. Did you observe him having any difficulty in doing that?

A. Yes, he did.

Q. What seemed to be the difficulty?

A. Well, he didn't seem to be able to walk.

Q. For what reason?

A. On account of his broken limbs.

Q. He has been at home with you since that time up to the present time?

A. Yes, sir.

Q. During all of this time from the time he returned from the hospital to the present time has he been able to walk normally as he did before?

A. No, he has not.

Q. Before he was hurt, for some four years before, was he able to walk rapidly and normally?

A. Yes, sir.

Q. What have you noticed with reference to his back since he was hurt during all this time and up to the present time?

A. He don't seem to be able to lift anything.

Q. How does he sleep compared with before the accident?

A. He doesn't sleep a bit well.

[fol. 81] Q. Have you done anything for his back to relieve his condition?

A. I certainly have.

Q. What have you done?

A. I massage him, put hot applications on him, rubbed his limbs.

Q. Has he complained of pain in his back?

A. Yes, he has.

Q. Has he awakened at night?

A. Yes, he has.

Q. About how frequently since this accident up to the present time have you rubbed his back and put hot applications on his back?

A. Every night.

Q. With reference to his feet, have you noticed whether or not they are swollen yet?

A. They are some swollen, yes.

Q. Have you done anything towards remedying the condition of his feet?

A. I have massaged them.

Q. Tell the jury about how long it would take?
A. I have bathed them in hot water and massaged them.
Q. How long would it take to massage his feet?
A. From half an hour to an hour.
Q. Have you done that frequently?
A. Yes, sir.
Q. About how many times a week?
A. At first it was every night, but of course now it is about three times a week.
Q. During the time that he has been at home you have seen him walk about?
[fol. 82] A. Yes.
Q. Has he ever been able to walk like he did before he was hurt?
A. No, sir.
Q. When he has walked have you heard him complain of pain?
A. Yes, sir.
Q. Have you walked with him?
A. Yes, sir.
Q. And tried to help him?
A. Yes, sir.
Q. When you have done that in walking out with him how does it affect him?
A. He seemed to be kind of weak. He didn't seem to be able to walk. He said his legs went back on him. Then he would have to stop and rest up a while.

Dr. Soren P. Rees, called on behalf of plaintiff, duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Dr. Rees, where do you live?
A. Minneapolis.
Q. Are you a duly licensed and practicing physician and surgeon?
A. Yes.
Q. In the state of Minnesota?
A. Yes.

Q. For how many years have you been practicing your profession?

[fol. 83] A. Since graduating in 1897.

Q. Of what school are you a graduate?

A. University of Minnesota.

Q. What year?

A. 1897.

Q. Have you taken any post graduate work?

A. Yes.

Q. Where and when?

A. Several short courses in the United States in the eastern medical centers and I spent one year in Europe, in 1909 and '10, most of the time in Vienna.

Q. Have you been connected with any schools in Minnesota?

A. Yes.

Q. In what capacity and for what length of time?

A. I was a member of the faculty of the medical school of the University of Minnesota from 1901 until late in the fall of 1916, being connected with the department of medicine and having charge of the work and teaching physical diagnosis to the medical classes.

Q. Have you had experience in diagnosing and passing upon injuries to the feet and the back and the arms?

A. Yes.

Q. To what extent?

A. To the extent that I have been engaged in practice and have seen all kinds of illnesses and injuries. First after graduating I was house physician one year at St. Barnabas Hospital, which was a surgical hospital admitting [fol. 84] all kinds of surgical cases. Then I practiced general medicine in the country, doing all kinds of work for three years. Then since returning to Minneapolis in 1901 I have been a member of the Swedish Hospital staff, seeing not only my own cases, but in consultation with other doctors, seeing other cases. I have been chief of medicine at the City Hospital, having charge of half of the medical cases from 1910 until about a year and a half ago, when I resigned. And in that way we see many surgical cases, both those that come under the medical service and are transferred and cases in the surgical service that develop some medical illness that we are called into consultation to decide what shall be done in a medical way. And then for

the last seventeen or eighteen years I have done a good deal of consultation work in diagnosis in surgical and accidental cases; in my private work, I mean.

Q. Did you have occasion to examine the plaintiff?

A. Yes.

Q. At our request?

A. Yes.

Q. When was the first time you examined him?

A. My first examination was on May 25, 1928.

Q. Did you at that time have some X-rays taken of Mr. Moquin?

A. I did.

Q. Handing you these exhibits, are these the X-rays that were taken?

A. These are the X-rays that were taken of Mr. Moquin [fol. 85] on May 25, 1928, at the Swedish Hospital, under my direction and in my presence.

Q. Were all of these taken at the same time?

A. Yes, sir, they were all, I think, taken on the same day, they all bearing the date of May 25, 1928, as a part of the exposure.

Q. Can you pick out the X-rays of the right foot and leg?

A. That is a picture of both the right and left, showing a part of the foot, all of the ankle and the lower third of the leg or half of the leg, about, below the knee.

Q. Handing you Exhibit A, I will ask you to state what that exhibit shows with reference to his right and left foot and leg.

A. Exhibit A is an X-ray film or shadow picture having two pictures on it. The one nearest to my hand is of Mr. Moquin's right ankle and the bones above it and a part of the foot below the ankle. That is taken in a front and back view so that it shows——

Mr. Davis:

Q. As you hold it it is the one to the left of the X-ray?

A. Yes, sir, the one that is nearest to my body. That shows the two bones of the leg that go side by side from the knee down to the ankle. The large bone, the thick bone, the shin bone, shows here to have been broken in several places in an oblique manner from the ankle joint upwards.

Q. By several places, how many would you say?

[fol. 86] A. There are two long breaks running in a somewhat parallel direction and then there has been some splin-

tering across between those just above the ankle, that is, the lower end of the shin bone. We call it a comminuted fracture because it is broken in more than one place. One at least of these breaks has gone into the ankle joint. That is, it has gone down into the end of the bone that makes the upper part of the ankle joint. That shin bone, as a result of those fractures or breaks is enlarged, increased in size, and in healing with callus there is new bone or callus between these and the small bone, the splint bone, by its side and there is some deposit in the joint side of the bone so that the joint does not look as clear through as the other leg. The picture on the other side of the film away from my body is the left leg.

Mr. Boyle: That is on the right side of the picture, as you look at it?

A. Yes, at your right.

Q. That is at your right as you look at it, isn't it?

A. As I turn it this way so that it would be at your right also.

Mr. Boyle: Yes.

A. Is a picture of Mr. Moquin's left leg to show the difference between the two, no breaks being in these two bones in the left leg. The crookedness of the little bone in his right leg shown about the middle of the bone that is exposed, evidently, from the looks of it, is an old injury, dating back many years perhaps and not attributed to this accident.

[fol. 87] Q. Did you take any other X-rays of his right or left foot?

Mr. Davis: We offer in evidence Exhibit A.

Mr. Boyle: No objection.

The Court: Received.

A. We took a picture of both the right and the left leg of the same parts as of Exhibit A, but at right angles to them. That would be a side or lateral view.

Q. Handing you Plaintiff's Exhibit B, being a side view, I will ask you to state whether that shows the injury to the ankle joint and the right leg?

A. This X-ray film shows both ankles, both the right and the left. The right is on the side of the film towards my hand or my body.

The Court: It would be the right-hand side of the picture?

Mr. Fryberger: So the record will show; that is the only thing.

A. Well, I simply want to make it plain because the picture as I look at it is just the opposite side, your Honor.

The Court: That is the left-hand side?

A. When I hold it I say the right leg is on the side where my hand is. It makes it plain for the jury.

Mr. Fryberger: Yes, but the record, Doctor, don't show where your hand is.

The Court: What side of the picture by right or left?

A. There is no side to it because I can turn it either way. [fol. 88] The right leg is marked with an "R" on the film so there can be no difficulty about it.

Mr. Davis: Explain the condition of the right leg, then.

A. There is a side view of the foot and ankle and leg and shows some things that the other film doesn't show and doesn't show many things that the first film did. That is why they are taken in both positions. The front part of the shin bone near the ankle in this view shows a fracture of the bone, one of the splintered parts that is sticking out a little below here that couldn't be seen on the other. Otherwise, this film, Exhibit B, shows nothing that Exhibit A didn't show.

Mr. Davis: Offer in evidence Plaintiff's Exhibit B.

Mr. Boyle: No objection.

The Court: Received.

Mr. Davis:

Q. Have you any other X-rays of his feet?

A. Those are X-ray films of both feet, taken in a lateral view, but don't show any fractures or dislocations of the bone, but does show that the bones of the left foot have become markedly decalcified; in other words, somewhat softened so that the salt or the earthy matters have been partly absorbed, due to disuse, and don't show the details of the bone clearly.

Q. Does Exhibit C show that he has sustained an injury to his left foot?

A. The X-ray films don't give any such evidence except the indirect evidence of the left foot showing absorp-

[fol. 89] tion of calcium salts, indicating that he has not used or exercised that foot.

Mr. Davis: We offer in evidence Exhibit C.

Q. Any other X-rays?
A. That shows nothing. That is a front and back view, but shows nothing abnormal.

Mr. Davis: We don't want to incumber the record with something that doesn't show anything.
The Court: Any objection to Exhibit C?
Mr. Boyle: No. Exhibit C, I understood, was received, your Honor.

Mr. Davis: Handing you Exhibit D, of what is that an X-ray and what does it show?
A. Exhibit D is a side view or lateral shadow picture of Mr. Moquin's right elbow, with the arm bent at right angles. It is marked, besides dated, with the letter "R," indicating that it is his right arm that has been taken and it shows the three bones that make up the elbow joint, the one single bone at one end, the humerus, that comes between the shoulder and the elbow, and then beyond the elbow joint in the opposite direction the two bones, radius and ulna, and the ulna is one of these two somewhat parallel bones that makes a hook around the head of the humerus, and that is shown, instead of being smooth and even and round, to be serrated or indented or uneven in that part of the bone that goes back of the elbow joint and catches the humerus and stops the arm from going backwards when it is once back straight, so that the X-ray shows that this bone has been injured and bruised so that the surface where [fol. 90] muscles and ligaments attach has been traumatized.

Mr. Davis: We offer in evidence Exhibit D.
Mr. Boyle: No objection.
The Court: Received.

A. That is another view of the elbow joint which you may want, but it doesn't show anything abnormal because that part of the bone is lost in the shadow of the others.

Mr. Davis: Do you wish this?
Mr. Boyle: No.

Mr. Davis:

Q. Did you take an X-ray of his back or spine?

A. Of his lower back and pelvis which is negative, but I think it is well to have it in if you wish it.

Q. Did you take an X-ray of his lower back?

A. We took two X-ray pictures of his lower back or spine, rather, and all of the pelvis, one front and back view, showing all of the lumbar vertebrae. Those are the vertebrae that come below where the ribs stop and go down to the pelvis. And it shows all of the pelvic bones with the hip joints. As far as the X-rays show they are negative and do not show any fractures or any dislocation of the bony parts.

Mr. Davis: Then unless counsel want them we will not introduce them.

Mr. Boyle: Very well.

Mr. Davis:

Q. You examined him first on May 25th, I believe?

A. Yes, sir.

[fol. 91] Q. At that time you made these X-rays and examined the X-rays?

A. Yes, sir.

Q. What did you find with reference to his physical condition as to his feet, back and right arm?

A. After learning that he had had an accident and what his complaint had been and what his illness had been and what his previous health history had been, and more particularly what he complained of at that time, on May 25th, I made an examination of his whole body and I found him in good physical condition except that he had enlarged tonsils and that his right ankle was larger by three-quarters of an inch when measured around than the left ankle was. Besides being bigger in size it had changed in its shape and contour, and he had very little movement of the foot at the right ankle at that time. In other words, the right ankle was practically stiff. I found the lower part of his back, especially below the waist line, tender and painful on movement and the end of his spine as far as I could tell very tender to direct pressure. I examined carefully his right arm and right hand. I found at that time that there was diminished sensation of feeling on his part in the

last two fingers on the right hand and as far as I could tell the strength or muscle power in those two fingers, and somewhat in the whole right hand and arm, was less than what power he had in the left hand. He walked at that time very poorly and with the aid of a stout cane.

[fol. 92] Q. When was the next time you examined him, Doctor?

Mr. Boyle: When was that first examination?

A. That was May the 25th, 1928.

Mr. Davis: When was the next examination?

A. October 24, 1928.

Q. Will you state what condition you found him to be in as to his back, right arm and legs at that time?

A. I found at that time the same lack of good use or control of his right hand. As far as I could make out he had at that time a marked diminution or decrease not only in the strength of the muscles of those last two fingers, but the movements seemed to be uncertain and not even or fully under control of his will. He could move them, but not with certainty. I found the same tenderness on palpation or pressure over the end of the spine; that is, between the buttocks just back and above the rectum. I found that the right ankle was about the same as before, enlarged in circumference about three-quarters of an inch and changed in shape and very little movement at the ankle. I found at this time, the same as I did on the first examination—and I don't think I mentioned that—that in trying to stand on his left foot, and especially on coming down on the heel and raising up on the ball of the foot, he complained of soreness in the heel bone on the left foot. That of course was his complaint, but as far as I could check it up by pressure and examination I felt satisfied that that bone in that part of [fol. 93] the foot was tender. At that time the right leg measured on careful measurement a quarter of an inch shorter than the left leg—did I say foot? I meant leg. The right leg from the hip down to the ankle bone was a quarter of an inch shorter than the left leg. The right ankle was three quarters of an inch bigger around, evidently due to the broken bones and the healing of those broken bones.

Q. When was your next examination?

A. April 19th, this year.

Q. State what you found with reference to his legs and back and arm?

A. The abnormal parts were that the tonsils were still enlarged, showing that Mr. Moquin has chronically enlarged tonsils. I found at this time that the nerve action in his right hand seemed better. The two fingers on the right hand and a distance going up the forearm are not, as far as I could tell, as numb or had the same amount of diminished feeling that I had found on the other two examinations, but the strength in the fingers was not up to what they were on the left hand yet. The right ankle had not changed any. That is still three-fourths of an inch larger than the left and is changed in its contour because of the break in that region. The movement of the right ankle, and that means the foot on the leg, is still very much diminished, and when I would try to move it forcibly Mr. Moquin would have unquestionable signs of pain. That, too, is because of the fracture and the healing, with the callus going into the joint and between the bones which [fol. 94] stiffens the joint. I found the same tender condition in the heel bone of the left foot which the X-rays do not explain. The X-rays only show when the bone is broken or is dislocated from its normal place. And I still found the end of the spine, the coccyx, as we call the very end of the spine, very tender to pressure. At no time did I find any temperature or any increased pulse, so that the enlarged tonsils, in my opinion, did not enter into these pains in the right ankle or in the left foot or in the right arm.

Q. Or in the back?

A. Or in the back.

Q. You heard Mr. Moquin's testimony here on the stand?

A. I did this afternoon since one-thirty.

Q. The testimony shows that he sustained this injury on February 27, 1928, a year ago last February. His testimony, as you heard it here, is to the effect that he has not been able to walk on either foot normally since that time, that he has had continual pain in the right foot, that he has had it massaged almost daily for a long time and then from two to three times a week by his wife, that he has tried to walk without a cane, that he walks easier with a cane and with less pain and more certainty. I will ask you, taking into consideration the condition you found his

foot in, his right foot, taking into consideration the testimony that he gave as to his pain and suffering, taking into consideration the length of time since this accident occurred, whether or not you have an opinion as to whether [fol. 95] he has sustained a permanent injury to that right foot?

A. I have.

Q. What is that opinion?

A. My opinion is that the injury to his right lower leg, involving the bones just above the ankle joint and in the healing of it, involving the ankle joint itself, has made a permanent disability.

Q. With reference to his left foot, taking into consideration the pain he has on putting his left heel down and that that pain has continued for fifteen to sixteen months and is still present, I will ask you if that is an indication to your mind that it is permanent?

Mr. Boyle: That is objected to.

The Court: The question is whether, in his opinion, it is or is not permanent. He may answer that yes or no.

(Exception by defendant.)

A. Was that question if I have an opinion?

Q. Yes?

A. Yes, I have.

Q. And what is that opinion, Doctor?

A. My opinion stated would be that I could not put it as positively in the left leg as I can in the right leg because there are not the same positive anatomic or physical changes, but because of the nature of the injury, the way it happened and the time that has elapsed since, it is my opinion that the sprain to that left foot has been such that the disability will surely be a long one and may be permanent, with this qualification, that nature always improves [fol. 96] and remedies things where she can and I should believe that with further time and use there would be some improvement in the left foot.

Q. Taking into consideration the length of time that the right foot has been in its condition, would you expect to see any further improvement in that right foot of any degree?

A. I would expect to see a little improvement. I do not believe a great deal because of the physical condition there.

Q. With reference to his right arm and the paralysis of these two fingers, to what do you attribute that?

A. The X-rays show a tearing of the covering of the bone, we call it the olecranon process, and injury in the region of the back part of the elbow joint, especially of the soft parts as well as the covering of the bone and the outer layer of the bone on that olecranon process, and the evidence is conclusive of a resulting irritation to the ulnar nerve, the large nerve that goes from the back part of the elbow along the forearm on the little finger side and supplies the two last fingers on the hand. The numbness and the diminished feeling and the abnormal sensation that Mr. Moquin complains of in those two fingers and that part of his hand is directly due to a disturbance in the function or irritation of that nerve up at the elbow.

Q. Would you expect that to repair or get entirely well or is it permanent?

A. That has improved considerably between the first and [fol. 97] last examinations, but it is a nerve that lies near the surface and is subject to exposure, both to heat and cold and bumping and has a long course and it is my opinion that he will have some disturbance with that, I believe permanently.

Q. With referencce to his back and the pain at the coccyx bone, the testimony shows that when he fell, he fell on his feet and then fell backward on the small of his back and had severe pains at the small of the spine, the end of the spine, as he said, taking into consideration that he has had this pain for the past fifteen months since the injury, whether or not that would be one of the factors in your mind as to its permanency?

Mr. Boyle: That is objected to.

The Court: The doctor may answer that question yes or no.

(Exception by defendant.)

A. It would be one of the factors, yes.

Q. During all the times you have examined him, you may state whether you found evidence of pain in the lower part of the spine.

A. Yes, I have.

Q. In your opinion, from your examinations and the testimony you have heard, you may state whether or not that

condition is a permanent one, that is, the pain which he suffers there and the injury he sustained there.

A. I can not positively state that that pain in this instance will be permanent. I can only state that in many similar cases, an injury to the very tip of the spine——

[fol. 98] Mr. Boyle: We object to the doctor going over the history of particular cases, as being incompetent, irrelevant and immaterial.

The Court: Doctor, in answer to that question you should express your opinion, not an explanation of other cases, but your opinion in this case. It might well be based upon your experience.

A. Very well. In order that I might not be misunderstood I try to give an opinion and share with the court and jury the experience upon which I base it, but I will answer it more directly. That condition is quite likely to remain permanent.

Q. Why do you state that?

A. Because of my personal knowledge and experience with many similar cases of a sensitive and painful coccyx or end of the spine.

Q. From your examination of this man and your observation of him, I will ask you if you have an opinion whether he will ever be able to do hard manual labor in the condition he now is and will be?

A. I have an opinion.

Q. What is that opinion?

A. My opinion is that he will not be able to do hard or heavy physical work that will call into active or hard use his feet and his legs and his back.

Q. In your opinion, would he be able to do the work of a railroad brakeman, climbing up and down cars and such work as that?

A. I do not believe he will.

Q. Why not?

A. Because of the limited motion that he has in his right [fol. 99] ankle and the interference with the use of his right leg because of that limited motion, as well as pain because of the sensitiveness of the left heel portion of the—yes, the heel portion of his left foot, which would not permit him to come down hard on that foot and also because of the uncertain control of a part of his right hand and arm.

Q. With reference to his walking, will this permanent condition of his right foot affect his walking?

A. It will.

Q. The use of his feet in walking like a normal man?

A. Yes, it will.

Q. Is that a permanent disability in Mr. Moquin?

A. Yes.

Q. He will have that as long as he lives?

A. Yes.

Q. In walking up-stairs like a normal person, will he ever be able to do that in his condition, in your opinion?

A. I can not say whether he will improve so much that, going slowly, he could finally balance or put his weight on either leg alternately. I couldn't say.

Q. I see.

A. There might be that much improvement.

Cross-examination.

By Mr. Boyle:

Q. If I get your testimony correctly, you state that the [fol. 100] X-ray pictures taken of the back disclose no injury to the bone?

A. No visible injury to the bone, no, sir.

Q. So far as the X-rays of the back are concerned, they were negative?

A. Yes, sir.

Q. Your findings regarding the injury to the back must necessarily be based, at least to some extent, upon what Mr. Moquin tells you about that?

A. Yes, to some extent.

Q. You, of course, also make tests of your own for the purpose of trying to make up your own mind whether or not there is pain there?

A. Yes, sir.

Q. And you came to the conclusion in making those tests that you did find some pain?

A. Yes, sir.

Q. That was your own observation in the matter?

A. Yes, sir.

Q. The evidence of the question of whether or not there was really pain there was something that must finally rest upon what Mr. Moquin said about it, isn't that right?

A. No, I don't think so. I think that is true as far as the amount of pain and the amount of trouble throughout the whole day and the whole week and the whole month, but as far as there being an abnormal, painful condition at the end of that spine, that I have satisfied myself as being present without his saying so or his complaint.

Q. You were able to make some tests from which you [fol. 101] could make up your own mind about that?

A. Yes, sir, the response to pressure the way it came and the immediate responses and the absence when a slight change was made in the location of pressure or examination.

Q. Did you notice that pain in the back upon your first examination of Mr. Moquin?

A. Yes, sir.

Q. And that, as you now remember it, was made last May?

A. Yes, a year ago.

Q. Yes, May 25th. That would be just about two months after the injury was sustained. The injury, you understood, was sustained on February 27th, 1928?

A. Yes, nearly three months.

Q. I think you said that you did not find that trouble in the back to be as bad then as it has been since then, that is, you have noticed an improvement there?

A. No, the improvement that I noticed on the last examination was in regard to the disturbance of the ulnar nerve in his right arm and last two fingers.

Q. Do you mean to say there has been no improvement, so far as you could observe, in the back?

A. Not as marked as there has been in his hand.

Q. In the hand, as I understand it, upon your first examination you found a numbness and a loss of strength in the little finger and the one next to it?

[fol. 102] A. Little and ring finger, yes, sir.

Q. What was the cause of that, did you say, an injury to the nerve?

A. An irritation or injury to the ulnar nerve.

Q. There is a direct connection between the ulnar nerve and those fingers?

A. Yes, sir. That is the nerve that buzzes and stings when you hit your so-called crazy bone.

Q. When you hit the crazy bone you feel it down in those fingers?

A. Yes, sir.

Q. And that is probably what happened in this case, was a blow on the crazy bone?

A. Well, a blow on the crazy bone, if you put it that way, and a distinct injury to that bone and the tissues covering it, as shown by the X-rays.

Q. Yes, but without fracture or dislocation of any kind?

A. I think it would be called a fracture when the bone is torn as roughly as it is here. There is really a tearing off or a fracturing of a part of the bone. It is not a cut through, but it is a tearing of the outer layer of the bone.

Q. Sort of a chipping, is it?

A. Yes, pulling apart in three or four places. The X-rays show that very clearly.

Q. Those bones in the arm are pretty well connected at the present time, aren't they?

A. Yes, sir.

Q. Did you take later X-rays?

A. No, we haven't.

Q. So that you did not take any X-rays, then, to de- [fol. 103] termine just what condition existed in that elbow at the present time?

A. I don't think they were necessary for me to make up my opinion about that.

Q. Is that the right arm or the left arm?

A. The right arm.

Q. Well, in that arm you have noticed a marked improvement, you say?

A. Yes.

Q. Isn't any reason to think that that is not going to get well entirely, is there, Doctor?

A. Well, I have always testified to that, that there has been, you may say, marked improvement. Loss of sensation has improved and there is some increase in muscle strength, but I still find evidence of irritation of that nerve and because it is a long nerve and a nerve near the surface of the body that is exposed and lies just on those hard, bony points that have been traumatized or markedly injured, I believe there will be some disturbance of that nerve right along.

Q. But up to the present time there has been a gradual improvement of that trouble and the use of the fingers in that hand?

A. Yes, sir.

Q. And is it your idea that that condition will perhaps continue to improve, at least to some extent, from this time on?

A. Yes, I should think there might be further improvement.

Q. I suppose that is the kind of a condition in which the doctors would be likely to disagree as to whether there [fol. 104] would be a complete cure or whether there would be some permanent disability there?

A. Doctors can disagree on any subject and on any phase of the subject. That is notorious. But at the same time, as I have already indicated, if this nerve was lying in flesh, soft muscle and nicely protected, I would think it proper to say that the improvement would most likely go on and might become complete, but because of the injury to the outside of the bone and the soft tissues in which that nerve lies, I believe that there is more or less fibrous or scar tissue and irritation, and in my judgment, some of it will remain.

Q. As far as your testimony regarding the back was concerned, you could not state that the pain would be permanent? Was that the testimony that you gave in answer to one of Mr. Davis' questions, or was I wrong about that?

A. Partly right and partly wrong.

Q. You did say that, didn't you, can't say that the pain is permanent in the back?

A. I think I said, and I meant to say, that about that pain and disability, I could not be as decisively positive as I could with the right leg and right ankle, because the X-rays did not disclose as clearly as it does with the foot just what injury took place.

Q. The X-rays, as I understand it, disclose no injury to the back?

A. Yes, sir, on that——

Q. They are entirely negative?

[fol. 105] A. They are entirely negative as far as bone injury goes. X-rays do not reveal any sprain or injury, such as the tearing or multilation or crushing of the soft parts. I thought we had already cleared that.

Q. The X-rays were entirely negative so far as the back was concerned?

A. Yes, sir.

Q. That same thing was true so far as the left leg was concerned?

A. Yes, sir.

Q. The X-rays of the left leg were entirely negative?

A. Yes, sir.

Q. You mean that the X-rays reflect no injury to the left leg?

A. No, sir.

Q. Or show no injury?

A. No, sir, that is not true. The X-rays disclose no injury to the bones of the left leg or foot.

Q. That is the only thing that you expect to find from the X-rays?

A. Yes, sir, but you stated that there was no injury to the left foot.

Q. No.

A. And that the X-rays are not competent to reveal. They only show disturbance of the bone.

Q. My question was with reference to the X-rays.

A. Yes, sir.

Q. The X-rays are entirely negative so far as that left foot or left leg are concerned?

[fol. 106] A. Yes, sir.

Q. So far as the right foot and the right leg are concerned, you found a movement in the ankle joint, is that right?

A. Some slight movement, but very much diminished.

Q. And then you found the ankle itself somewhat enlarged?

A. Yes, sir.

Q. What is the reason for that?

A. The reason is that the size of the ankle, measured around, is made up of skin and the soft parts, meaning flesh and tendons and nerve and then the bones, and that this bone called the tibia or the shin bone has been split in its lower end, upwards in two main directions—in three directions, in three places, I mean, and that there has been some separation where those splits have come or fractures and in healing, callus or healing material has had to get in

between these split parts and around them and in that way the bone has considerably enlarged and the soft tissues that were injured with the breaking of the bone have also permanently enlarged and that is what makes the enlargement of the ankle.

Q. Where was that old injury that you found?

A. The old injury is in the small bone or splint bone in the leg which is on the outside and comes up a little further up from the ankle than a third towards the knee. The X-rays show that very clearly as a fracture where the bones were not placed end to end, but a little side by side, making [fol. 107] an oblique deformity there.

Q. Was that in the right leg?

A. That was in the right leg.

Q. Above the ankle?

A. Yes, a third above the ankle, towards the knee.

Q. This last injury which is involved in the present case involves the ankle joint, does it?

A. Is in the big bone, is in the other bone, away down near the ankle joint, yes, sir.

Q. Was the bone that was injured in the old accident injured in this accident?

A. Not broken. Somewhat involved in the callus——

Q. Oh, yes.

A. That comes out in the healing of the lower end of the shin bone next to it.

Q. Do I understand that you say there are two principal fractures of that bone? I am talking now of the large bone in the right leg.

A. Yes, sir, I think there are three.

Q. Let me hand you the X-ray. Is this the right?

A. Yes, sir. There is the little splint bone showing that old deformity, that break he had 25 years ago, that he told me about.

Q. Twenty-five years ago?

A. Yes.

Q. Well, didn't you understand he was injured some four or five years ago?

Mr. Davis: Five years ago.

A. That was in the big toe on the left foot some four [fol. 108] years ago. This was a fracture, as I understand

it, he had 25 years ago, while working for the Soo Railroad. That is evidently an old fracture because it is completely united with solid bone and time has made it smooth.

Q. Well, would that heal up like that in four of five years?

A. Well, this goes back, as I understand it, 25 years.

Mr. Davis: Doctor, I think you are mistaken there.

Q. Suppose you should be wrong and it would go back only four or five years; it would heal up in four or five years?

A. Yes.

Q. I don't think there is going to be any misunderstanding between us; that is not involved in this injury?

A. Not as I understand it.

Mr. Boyle: Mr. Davis, you are making no claim that the prior injury affects him now, are you?

Q. Well, what do you say about that, Doctor?

A. Oh, that looks like a good, clean repair and the bone is separated from the other one and there is no bony callus between, so I would say that that was a successful healing.

Q. That is, the leg got pretty well after that other injury was healed up pretty well?

A. That is my belief.

Q. Would it be just as good a leg as before or would it be not quite so good or what do you say about that?

[fol. 109] A. Well, functionally about as good. That is just about a plain bone, you see.

Q. Point out these other fractures to me.

A. You see that straight line coming down there, you see that hump coming out here then and the increase in width there, instead of coming down straight and nice and clean. Do you see that shadow, that gap, runnning down here like that? That is a fracture running from the outer tip of this shin bone, going away up beyond the old fracture and making a deformity on the other side.

Q. Is this callus out along here?

A. Well, that is partly bone that has slipped out of position, you see. In that fracture it never came in as far as it should, just as in the old fracture the position was

imperfect. That is the rule, with more or less change in position of the parts.

Q. It is true that there is going to be some limitation of motion in that ankle joint, isn't there?

A. Yes, sir.

Q. And considerable limitation there?

A. Yes.

Q. I don't know that we are going to have any great dispute about that, but after nature gets a chance to heal that up, there is not going to be any reason why he can not stand on it or walk on it, outside of the fact that he will have a stiff ankle, am I right about that or wrong about that?

A. Oh, I think he can stand on his right foot, yes, sir.

Q. When nature has a chance to heal up that right foot, [fol. 110] there isn't going to be any pain left in it when he stands on it, is there?

A. Yes, I think there will be.

Q. Why should there be any pain left after that heals up?

A. I haven't answered your first question. You asked about these fractures. I pointed out one that goes—that is quite a number of inches from the ankle up here and goes obliquely over and comes practically into the ankle joint on this side. Then, there is another fracture, or rather two of them, running straight into the joint and going up in this direction. In fact, there are two lines and the other view shows the front part of this shin bone broken off in a little triangular piece. Now, it is because of those multiple, several fractures, two or three or possibly four, that run into the joint, that is not only limiting the movement of that joint, but by making fibrous connective tissue is going to make the joint painful. And that is why, while he is going to get good bony healing there and a strong leg, that I believe that motion at that ankle will always be very little, the ankle will be pretty stiff, and those changes in the joint will make it painful, not enable him to do what he otherwise would do, as far as the strength of the bone goes.

Q. Do you call it a fracture, Doctor, whenever there is any chipping of the bone?

A. Oh, any break in the continuity of the bone is a fracture, sir, whether it is a small piece or a long sliver.

[fol. 111] NOAH MOQUIN, the plaintiff, re-called in his own behalf, testified as follows:

Direct examination.

By Mr. Davis:

Q. Mr. Moquin, this ice where the wheels had cut through, was it covered with snow?

A. Yes, sir.

Q. About how much of a drift of snow over it?

A. About five or six inches.

Q. What was the condition of that snow as to being clean or dirty or looking old or fresh?

A. Dirty, cinders in it, dirt and so on.

Q. And the snow completely covered the ice?

A. Yes, sir.

E. M. RENNIE, called by plaintiff, duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. What is your first name?

A. Ernest.

Q. You were the conductor in charge of the train on the day of this accident?

A. Yes, sir.

Q. As conductor for the Soo Line you are familiar, I presume, with the rules and rule book in force at that time?

A. Yes, sir.

Q. I hand you Plaintiff's Exhibit "E" and ask you if that was the rule book in force at that time?

A. Yes, sir, that is the rule book.

[fol. 112] Q. You are familiar with the rule book you have had as conductor?

A. Yes, sir.

Q. You are familiar with the different rules governing the duties of track men, section men and other employes, you are required to be familiar with the entire rule book, are you not?

A. Yes, sir.

Q. Calling your attention to page 68, 102-a, I will ask you if that was one of the rules in force at the time of the accident?

A. That is the rule, but there were superseding bulletins which make that rule in some respects void.

Q. This rule, you say, was not in effect then?

A. With limitations.

Q. With limitations. Then handing you 103, was that rule in force at the time of the accident?

A. Yes, sir.

Q. That appears on page 68. Then, on page 70, rule 107, that rule was in force at the time of this accident?

Mr. Boyle: What was the number of that rule?

Mr. Davis: 107.

A. That is also with bulletins that cover it.

Q. You mean that rule is not in force?

A. It is in force, but there might be bulletins.

Q. Is there any bulletin that has ever changed rule No. 107 in any way, that conductors and engineers are responsible for the safety of the train?

A. Not for the safety of the train.

[fol. 113] Q. That is all it says?

A. Yes.

Q. That was in force, wasn't it?

A. Yes, sir.

Mr. Davis: W- offer in evidence 103 and 107.

Mr. Boyle: I don't know what they are, Mr. Davis.

Mr. Davis: I will go over the different ones, then.

Q. Calling your attention to page 133, the first paragraph of rule 710, I will ask you if that was not in force at the time of the accident?

A. Yes, sir.

Q. And calling your attention to rule 830, on page 147, was that rule in force at the time of the accident?

A. Yes, sir, that rule was in effect.

Q. And calling your attention to 1151 on page 195, first paragraph, I will ask you if that rule was not in force at the time of the accident?

A. Yes, sir.

Q. And calling your attention to rule 1152 on page 195, I will ask you if that rule was not in force at the time of the accident?

A. Yes, sir.

Q. And calling your attention to the first paragraph of rule 1156, page 196, I will ask you if that was in force at the time of the accident?

A. Yes, sir.

Q. And that rule had been in force and the rules I mention had been in force for some time before the accident?

[fol. 114] A. Excepting bulletins.

Q. Yes, I have not asked about 102, outside of 102?

A. Yes.

The Court: What was the answer to the last question—yes?

Mr. Davis: Yes.

Q. Mr. Rennie, you were the conductor on that train?

A. Yes, sir.

Q. Do you know whether or not during the entire week previous to the accident, you or any of your crew had been in that house track?

A. I don't know.

Q. Not so far as you know had any switching been done on that house track the week previous, had there?

A. I don't know.

Q. Well, you don't recollect of any?

A. There are other trains outside of my train.

Q. I say so far as your crew?

A. I don't know.

Q. Did you set out the cars on the house track?

A. No, sir.

Q. Do you know how many days they had been there before the 27th?

A. No, sir.

Q. So far as your recollection goes, you have no recollection of any of your train crew going on the house track the week prior to the accident?

A. No, sir.

Mr. Davis: We offer in evidence rules 103, 107, 710, 830, [fol. 115] 1151, 1152 and 1156.

Mr. Boyle: So far as these rules are concerned we will have to have an opportunity of checking them over so that we may be in position to state to the court for the record just what our position is. If we find that these rules have not been superseded by some other rules or that they are material in the case, we are not going to have any objection to them. If we think that they are not material in the case, I would like to make the proper objection, or if we find that they have been superseded in some way we will try to explain how they have been superseded so that we will have the right rules, if they are at all material.

The Court: The court will not rule on the offer until tomorrow morning. During that time you will have an opportunity to examine them. I haven't seen them and I do not know whether they would be material to this case.

Cross-examination.

By Mr. Boyle:

Q. Mr. Rennie, it is a fact that bulletins are issued from time to time which supersede the regular rule book, is it not?

A. Yes, sir.

Q. In what form are those bulletins usually issued?

A. They are issued over the superintendent's signature or general manager and put on the bulletin board.

Q. Are those new rules ordinarily printed in what is [fol. 116] known as the time table?

A. When a new time table comes into effect they are. Prior to that they are on the bulletin boards.

Q. So that there may be an order in effect by the posting on a bulletin board even before it is printed in a time table?

A. Yes, sir. Also some of those rules pertain to roadmasters and section men that we don't have access to those bulletin boards and would not be familiar if they were changed.

Q. So that so far as the rules relating to brakemen and section men are concerned, the only thing you would know

about those would be that Mr. Davis has pointed out rules from what you know to be an official rule book of the Soo Railway Company?

A. Yes, sir.

Q. But as to whether or not those particular rules were in force or effect at the time of this accident, you would not know about that?

A. If they were not pertaining to my department.

Q. You were asked about rule No. 102-a, and did I understand correctly that you said that that rule 102-a had been superseded, and that another rule was in effect at the time of the accident?

The Court: That rule was not offered.

Mr. Boyle: No, your Honor, it wasn't. It has been changed.

Q. I call your attention to Defendant's Exhibit "2," what is this Defendant's Exhibit "2"?

A. It was the current time table in effect at the time of [fol. 117] the accident.

Q. And this rule which is known as rule No. 102, printed in the time table, Defendant's Exhibit "2," superseded this rule No. 102-a, which is printed in Plaintiff's Exhibit "E"?

A. Yes, sir.

Q. So that at the time of this accident rule No. 102-a, printed in Plaintiff's Exhibit "E," was not in effect, and rule 102, printed in Defendant's Exhibit "2," was in effect?

A. Yes, sir.

Mr. Boyle: I believe that covers it.

Redirect examination.

By Mr. Davis:

Q. Would you say the rule superseded or modified with reference to rules 102-a and 102?

A. Well, when a bulletin is issued it supersedes.

Q. Doesn't it modify it, except so far as it is inconsistent? A later bulletin would modify it, but so far as it is consistent with the other rule, it would apply, would it not? Kept in the rule book.

Mr. Boyle: Object to that as cross examination. Calling for a conclusion of law and fact.

Mr. Davis: I think that is all at the present time.

Mr. Davis: Plaintiff now offers in evidence to show from the American Experience Table of Mortality that the normal expectancy of a man 45 years of age is 25.54 years. Any objection?

[fol. 118] Mr. Boyle: Objected to as incompetent, irrelevant and immaterial.

The Court: May I see the table?

Mr. Davis: Your objection is not as to its competency? You do not object on that ground, do you, Mr. Boyle?

Mr. Fryberger: Well, while not making a specific objection, we do not wish to concede at all that a man of his years would draw this kind of a salary or earn this kind of a salary during his life or expectancy. I do not think we will make any point, however——

The Court: As to the expectancy of life. That is, it is not conclusive on the jury, but they may take it into consideration.

Mr. Davis: That is it exactly.

Mr. Fryberger: We have no objection on that ground.

The Court: It is received.

(Counsel confer with the court, after which the following proceedings were had:)

Mr. Davis: Plaintiffs rests. Oh, we will have the understanding that if we require a longer time than tomorrow morning we can put him on?

Mr. Boyle: Yes.

Mr. Davis: It is understood we couldn't get him today. And may it be understood that Defendant's Exhibit 1 is received in evidence?

Mr. Boyle: Yes, there is no trouble about that.

The Court: It may be received.

Plaintiff rests.

[fol. 119] Mr. Boyle: If your Honor please, it seems to me that the issues in the case have all been outlined sufficiently so that an opening statement on behalf of the defense at this time will not be necessary, so we will waive our opening statement and go ahead with our witnesses.

The Court: Very well.

For the Defendant

RUDOLPH RAASCH, called on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Where do you live?
A. Minneapolis at present.
Q. And what is your business or occupation?
A. Section foreman.
Q. How long have you been section foreman?
A. Been permanent section foreman for about seven months.
Q. Were you the man in charge of the section at Cloverton?
A. Yes, sir.
Q. At the time of the derailment when Mr. Moquin was injured?
A. Yes, sir.
Q. How long had you been in charge there?
A. I was there just about a month and a half at that time.
Q. How long had you been connected with the section before that time?
[fol. 120] A. Since 1922.
Q. On the Soo railroad?
A. On the Soo.
Q. On this day of the accident in which Mr. Moquin was injured about what time of the day was it that the train came through there?
A. It was around noon; around 12:00 o'clock.
Q. Where were you and the other section men at the time the train came into Coverton?
A. At the west end of the section.
Q. Would that be at the end of the section in the direction in which the train was traveling?
A. Yes, sir.
Q. That train was traveling west?
A. West.
Q. Where was the end of the section?
A. About three miles west from Cloverton.

Q. Three miles west of the depot at Cloverton?

A. Yes.

Q. When you say west, you mean in railroad parlance?

A. Railroad terms.

Q. That would really be south of Cloverton, would it?

A. Yes, sir.

Q. Why were you men down there at the end of the section on that day?

A. Had instruction to be down there to unload this particular carload of ties.

Q. And you were going, as I understand it, to peddle those ties out along your section and the next section?

[fol. 121] A. Yes.

Q. That is the customary way of throwing ties out, as you move along, is it?

A. Yes, that is the way I was instructed.

Q. And how many were there in your crew?

A. Two at that time.

Q. Two men besides yourself?

A. Yes.

Q. Do you mean that you were going to peddle or throw out the ties from the particular car of ties that was afterwards derailed?

A. Yes, sir.

Q. So that car of ties was to be picked up and put on the train and then as the train came to the end of the section you men would get on there?

A. Yes, sir.

Q. Into this car of ties and help to distribute the ties along the way?

A. Yes, sir.

Q. That car had been standing there or was standing on that day on the house track there at Cloverton?

A. Yes, sir.

Q. Did you wait down there at the end of the section until the train passed you there?

A. Yes, sir.

Q. And as the train came along I suppose you expected it to stop?

A. Yes, sir.

Q. When the train passed you without stopping, as you understood it would stop, what did you do?

[fol. 122] A. We went back to Cloverton to find out what the cause was.

Q. You figured that there must have been some change in the instructions?

A. Yes, sir.

Q. Or that something had gone wrong?

A. Yes, sir.

Q. So that did you go immediately back to Cloverton?

A. Yes, sir.

Q. About what time do you think it was when you got back there?

A. It was after one o'clock, between one and two. I couldn't tell you the exact time.

Q. When you got back to Cloverton what did you do there?

A. Well, we could see from a distance what had happened, where the cars were.

Q. That is, as you were pulling into the station you could see that a car had been derailed?

A. Yes, sir.

Q. What did you do?

A. Went over and looked at it to see what it was like.

Q. What did you see there?

A. See where the car was derailed, shoved off from the track.

Q. You made some inspection of the premises at that time, did you?

A. Yes, sir.

Q. And then did you at that time or some time later clear out the track?

[fol. 123] A. Yes, sir.

Q. At the place where the car had been derailed?

A. Yes, sir.

Q. About when was it that you did that? Was it that same day?

A. Well, we started about two hours later to clean out the snow, but didn't finish until the next morning.

Q. And what did you find there on the track?

A. Snow.

Q. Was there any ice on that track?

A. No, sir.

Q. Either at the place of derailment or anywhere along that track?

A. No, sir.

Q. Could you tell from the marks on the rails or in some other way the place where the car hal left the track?

A. Well, it was pretty hard to tell just at that particular time because there had been so many people tramping around in the snow that you couldn't very well see the marks. I didn't notice the marks on the rail that day.

Q. You didn't notice them while you were shoveling it out, you mean?

A. Well, I noticed the marks in the snow, but not on the rail as they were taken, until a few days afterwards.

Q. But could you tell from the marks in the snow where the car had gone off the track?

A. Yes.

Q. And as I understand it, your testimony is that there [fol. 124] wasn't any ice anywhere along that track?

A. There was no ice to interfere whatsoever.

Q. About how deep would you say that snow was?

A. Well, it avereged between fourteen and twenty-four inches, about that.

Q. What kind of a day was it?

A. Soft, mild day.

Q. Was there some thaw?

A. Yes, it was thawing.

Q. At about that time, so that the snow was soft and packed?

A. Packed.

Q. So that you could easily make a snow ball out of it?

A. Yes, sir.

Q. Were there any marks that you could see there that would indicate how deep the snow was?

A. Well, the only mark I noticed was where the journal box cut through the snow.

Q. Do you know how high the journal box is?

A. I do not. I didn't measure it.

Q. You didn't measure it?

A. No.

Q. But you do remember that there were marks of the journal box cutting through the snow?

A. Yes, sir.

Q. What do you mean by the journal box?

A. Well, it would be where the ax rests, the ax of the wheel rests in.

Q. Could you tell about how far that car traveled along [fol. 125] the track after the wheels left the track?

A. Well, I didn't measure it.

Q. Where was the car when it stopped?

A. Well, one set of trucks was across kind of a ditch that was there next to the warehouse.

Q. The front set of trucks?

A. Yes.

Q. And where were the other trucks?

A. The rear trucks, one set of the wheels of the trucks were off and the other set of wheels was on the track.

Q. Then the rear set of wheels of that car remained on the track?

A. No, just one set of wheels. There is four wheels on the truck.

Q. Yes.

A. Well, one set of wheels were off the track and one set of wheels was on the track.

Q. That is one set of wheels of the rear truck?

A. Yes.

Q. Remained on the track?

A. Remained on the track and one set was off and one truck was off complete.

Q. The entire front truck?

A. Yes.

Q. What did you do in cleaning out the track, what part of the track did you clean out after that car was derailed?

A. Well, we cleaned out under the snow, underneath so they could get ready to re-rail it.

[fol. 126] Q. Was that all the distance from where the car was then standing off the track back to where it had first left the rails, you cleared that all out, did you?

A. Yes.

Q. And found no ice there?

A. No ice to interfere whatsoever.

Q. And when was the car re-railed again, put back onto the rail?

A. The next day.

Q. That was done the next day?
A. Yes, sir.

Cross-examination.

By Mr. Davis:

Q. Mr. Raasch, what time did you start to clean this out?
A. Well, I couldn't tell the exact minute. I didn't look at my watch.
Q. I say about what time?
A. I would say about—oh, about three or three-thirty, something like that.
Q. How long did you work that day?
A. Five o'clock.
Q. And how many men worked with you?
A. Two.
Q. You were cleaning out the place where the car had derailed?
A. Yes, sir.
Q. Then you didn't finish it that day?
A. No.
Q. About how many feet would you say you cleaned out [fol. 127] where the car was derailed?
A. Oh, I should judge about twenty or twenty-five feet in there.
Q. Three of you worked from three o'clock to five or three-thirty to five?
A. Yes, sir.
Q. And how long did you work the next morning?
A. Well, we done some shoveling snow and we unloaded some of the ties.
Q. I say how long did you shovel snow the next morning?
A. I couldn't give you the exact time.
Q. How long did you shovel snow the next morning?
A. Well, it is hard to say.
Q. Was it four hours?
A. No, it wasn't four hours.
Q. Was it three hours?
A. I couldn't say for sure.

Q. Well, was it about three hours? You did the work there; you ought to know. Was it about three hours that you shoveled in the morning, you three men?

A. Might have been three hours.

Q. Yes.

A. And might not.

Q. So an hour and a half the day before would be four hours and a half it took three men to shovel a space twenty-five feet long, that is true, isn't it, your best judgment?

A. Yes.

[fol. 128] Q. And who used the picks? You used a pick, didn't you?

A. Where the snow was hard, yes.

Q. You used a pick, didn't you?

A. No, sir, I didn't use a pick.

Q. Who did use the picks?

A. Where the snow was packed the men had to use the pick.

Q. Well, you had to break up chunks of hard snow or ice there?

A. No ice whatsoever.

Q. Well, it was so hard that you had to use a pick instead of a shovel, didn't you?

A. The only place we used the pick was where the wheels ran.

Q. The only place you used the pick was where the wheels ran?

A. After they were off the track where they packed the snow.

Q. Well, you saw where the car had come through that same snow, same kind of an operation right along, and had not been derailed, didn't you? You saw that, didn't you?

A. No, there was no snow ahead of this.

Q. Wasn't there any snow ahead of this?

A. Not ahead of this?

Q. Not a bit of snow?

A. No, sir.

Q. The rails were all clear, were they?

A. From the crossing on, yes, sir.

Q. Not a bit of snow?

A. No, sir.

[fol. 129] Q. You are sure of that now?

A. Yes, sir.

Q. And the car was derailed 150 feet west of this crossing, wasn't it?

A. Yes, sir.

Q. And it took you men, as I understand, five hours and a half or four hours and a half to clean that snow, or whatever it was there, so you could re-rail the car, didn't it?

A. I wouldn't say it was four hours and a half. I didn't give the exact time.

Q. Well, that was your best judgment? I understood you to say so.

A. Because we done other work with it.

Q. And how long before you got the car re-railed that day, what time in the afternoon? When did you get the car re-railed?

A. I don't know the exact time either. I didn't keep track of the exact time.

Q. Well, about, I say? About when? What time in the afternoon did you get the car on there?

A. The car was re-railed after five o'clock.

Q. The next day?

A. Yes, sir.

Q. So outside of unloading the car you men spent your time cleaning out that twenty-five feet, didn't you?

A. Yes, sir.

Q. And didn't get the car re-railed until five o'clock the next day, that is true, isn't it?

A. Well, the car wasn't re-railed till five o'clock, after five.

[fol. 130] Q. Well, I say until five it wasn't re-railed, anyway?

A. Yes, sir.

Q. And outside of unloading some of the ties—or were all of them unloaded? Did you unload all of them?

A. Not all of them.

Q. And outside of unloading them your time was spent shoveling out this track, wasn't it?

A. Yes.

Q. And you started what time the next morning?

A. We started at eight o'clock.

Q. And you had to use a pick to do it, didn't you, in addition to a shovel?

A. It froze that night.

Q. I didn't ask you that.

Mr. Davis: I move that be stricken out, your Honor, as not responsive.

Mr. Fryberger: What was the answer? I didn't hear it.

The Court: He said it froze that night. The answer may be stricken as not responsive to the question.

Mr. Davis:

Q. If you will kindly answer my question: You had to use a pick in order to clean it out, didn't you?

A. Yes, to clean out the frozen snow.

Q. What?

A. To clean out the frozen snow.

Q. Oh, yes. Now, Mr. Rausch, you, as section foreman, [fol. 131] were responsible for the condition of that track, weren't you?

A. Yes, sir.

Q. You were responsible. If there was, as Mr. Moquin testified, ice over that track you were the one responsible for that condition, weren't you? Isn't that true?

A. Yes, in a certain way.

Q. Well, absolutely you were responsible, weren't you?

A. I was supposed to report if there was ice over it, yes.

Q. And it is your duty to go over that track every day, isn't it?

A. Yes, sir.

Q. Every day, isn't that true?

A. Yes, sir.

Q. And it is your duty to keep that track cleaned out so that cars can come in there without being de-railed, isn't it?

A. Not snow.

Q. Well, wait a moment. Isn't it your duty to keep the track in such a condition that either snow or ice will not get there in such a condition as to de-rail a car, isn't that true?

A. Well, I can't stop the snow from getting there.

Q. Oh, no, but you can take it away, can't you?

A. Well, we are not supposed to take it away.

Q. Do you mean to tell this jury that it is not a part of your duty as section foreman to see that the track is safe for cars to come in there?

[fol. 132] A. Unless we get special orders to shovel it.

Q. You wouldn't shovel it if you knew it was packed so hard that if a car came in there when they were switching it would be de-railed, you would not touch that track?

A. Well, if it is packed, yes.

Q. Well, you found it packed, didn't you?

A. It wasn't packed until it was de-railed.

Q. Oh, I see. Well, you can tell the jury what, in your opinion, de-railed that car?

A. In my opinion, it was the packed snow.

Q. Hard?

A. No, soft, while backing the car into the snow, packing it.

Q. So just backing the car into the snow it would de-rail it, snow so soft you could make a snow-ball?

A. Yes, and the depth of the snow.

Q. And so soft that day that you could make a snow-ball out of it, that is what you want the jury to understand, is it?

A. Well, the snow was soft, packing, wet thawing.

Q. It was your duty to see that the tracks on your station all along are at all times safe for the passage of cars over the tracks, yes or no?

A. Yes.

Q. And that was your duty that day and the day before and five days before, wasn't it?

A. Yes.

Q. And you knew that some three or four days before there had been a heavy snowfall there at Cloverton, didn't [fol. 133] you? You knew that?

A. Yes.

Q. And you knew that there was a heavy drift over this track, didn't you?

A. It didn't drift until the night before, the heavy drift.

Q. The snow fell five days before and you want the jury to understand it didn't drift at all for five days after?

A. It drifted, but there wasn't any amount of snow on the rails.

Q. Well, don't you know that the 26th was a day when it was warm and the snow melted so it couldn't drift that night, don't you know that?

A. Well, it drifted on the 26th, that night.

Q. Don't you know that it melted so it couldn't drift on the 26th? Don't you know that, Mr. Raasch?

A. Well, it drifted on the 26th.

Q. When did you first know you were to be a witness in this case?

A. When did I know I was the first witness in this case?

Q. Yes?

A. Why, when I was called.

Q. When?

A. Well, the first time I was called to be a witness. I don't remember the exact date now.

Q. When you were——

A. For the witness for today, right today, you mean?

Q. No.

[fol. 134] A. Or from the beginning?

Q. From the first time?

A. From the first time?

Q. Yes, sir.

A. I can't give you the exact date now when I was called.

Q. Who was the first person that you claim to have told that you saw packed snow there and when was that?

A. Claimed there was packed snow?

Q. Yes?

A. I didn't tell nobody it was packed snow.

Q. Or hard snow, who was the first person and when did you tell that person that there was hard snow?

A. It wasn't hard snow till the car was de-railed.

Q. Until after the car was de-railed?

A. No.

Q. Oh, it was soft snow until the car was de-railed?

A. It was soft and thawing that day.

Q. So there wan't any hard snow at all, you would have the jury understand?

A. Not before the car was de-railed.

Q. So the soft snow was all you saw there?

A. Yes, sir.

Q. Now, who was the first person that you told there was hard snow after the car was de-railed?

A. I didn't tell nobody it was hard snow after the car was de-railed.

Q. Well, you testified to it here, didn't you?

[fol. 135] A. Well, I told myself, yes.

Q. Did you ever tell anybody before you stated it on the stand here?

A. No.

Q. Never told a soul? You are sure of that, aren't you?

A. Not that I recollect.

Q. Well, you don't recollect of telling anybody of the snow being hard after the de-railment until you stated it here on the stand?

A. I supposed naturally after the de-railment the snow was hard, got packed. I supposed naturally anybody would say it was.

Q. Do you remember of saying it to anybody?

A. Well, I don't recollect just now.

Q. Don't recollect of saying to a human being that that snow was hard after the de-railment?

A. I don't just recollect.

Q. Until you said it here today in court?

A. I might have said it.

Q. And you might not have, too?

A. I don't remember.

Q. You don't remember saying it, do you?

A. No, I do not.

Q. Until you came here today in court, that is true, isn't it?

A. It might be that I said it and might not.

Q. But you don't remember of saying it, I say?

A. No.

Q. That is a fact, isn't it?

A. Yes.

Q. And you as section foreman were responsible for the [fol. 136] condition of those tracks, weren't you? Yes or no.

A. Yes, sir.

Q. Are you still working for the Soo Line?

A. Yes, sir.

Q. What doing?

A. Section foreman.

Q. Where?

A. Minneapolis.

Q. How long after this accident did you leave Cloverton?

A. How long after the accident?

Q. Before you left Cloverton?

A. Oh, it was some few months afterwards.

Mr. Davis: That is all.

Redirect examination.

By Mr. Boyle:

Q. Mr. Raasch, I don't know that I understand just when it was that you used the picks on the packed snow there, was that the day of the de-railment or the next day?

A. The next morning after it had froze, the snow had froze.

Q. So that whatever work you did there on the day of the de-railment you used no picks at all?

A. No picks at all.

Mr. Davis: Just a moment, please. Don't lead the witness.

Mr. Boyle: Well, I think that is already in the testimony.

Q. What is the fact as to whether or not it did freeze [fol. 137] over nigth, Mr. Raasch?

A. Yes, it froze over night.

Q. It was a cold night, was it?

A. Yes, sir.

Q. When you went back the next morning and continued the cleaning out operation, did you find that the snow had frozen there over the night?

A. Yes, sir.

Q. And in order to clean it out properly you used picks the next day, did you?

A. Yes, sir.

Q. I guess you testified as to the depth of the snow and as I understand it, that snow before the car was derailed wasn't packed or hard?

A. No, sir.

Q. Will you explain to us a little more clearly just what you mean about packed snow, where did you find it when you made that inspection and what was your idea of what caused the packed snow to be there?

A. Well, before the de-railment there was just a snow back there and the snow wasn't hard, but it thawed during that day and caused the snow to get soft and when the car was pushed back in this snow and it was de-railed the car

wheels going back into the snow packed it when it was derailed off from the rails, which packed it.

Q. That is, Mr. Raasch, is it your idea that if a car is derailed and goes out into a snow bank the marks made by the wheels of that car will pack the snow down?

A. Yes.

[fol. 138] Q. As it moves along?

A. Yes.

Q. And is that the condition that you found there?

A. Yes.

Q. Outside of the packed snow that you found there that was caused in that manner, was there any ice or hard snow there?

A. No.

Mr. Davis: That is objected to as repetition, all gone over three times.

The Court: The witness may answer.

(Exception by plaintiff.)

Mr. Boyle:

Q. Was there any ice or any hard snow anywhere along that track where the car was derailed or in that vicinity, outside of this packed snow that you have told us about?

A. There was no ice whatsoever.

Q. Was there any other hard snow, outside of the packed snow caused by the wheels of the car?

A. No, sir.

Q. I want to point out to you this Defendant's Exhibit "1." Here is the depot right here. Can you see from where you are?

A. Yes, sir.

Q. There is a mark over here on the plat "Marks on the west rail," can you see that from where you are?

A. Yes, sir.

Q. Is that in the vicinity of where the derailment took place?

[fol. 139] A. Yes, sir, it is.

Q. And was there any snow at all on that housetrack west of the Main street crossing shown on this plat?

A. West of the Main street crossing there was very little.

Q. And what was the fact as to whether or not there was any snow on the track east of the Main street crossing, up to the place of derailment or close to that place?

A. Well, from the crossing we shoveled it out a ways and from there on on the rails up to the derailment there wasn't any snow.

Q. What was that you said, from the crossing you what?

A. We cleaned the crossing, you see, we shoveled the snow out. From there on to the derailment there wasn't any snow on the rails or in between.

Q. When did you shovel the crossing out?

A. That morning.

Q. Just what do you mean by shoveling out the crossing?

A. Well, the snow drifts over the crossings in the flange. We shoveled out all the crossings and the switches.

Q. And is it the duty of the section crew to keep the crossings and the switches cleaned out?

A. Yes, sir.

Q. And the flange ways?

A. Yes, sir.

Q. At the crossings and switches?

A. Switches.

[fol. 140] Q. Now, Mr. Raasch, what is the fact as to whether or not it is the duty of the section crew to remove snow drifts from the tracks, outside of these crossings and the switches?

A. The section men has nothing to do with it.

Q. And what department or how is the snow removed from the tracks?

A. By flangers.

Q. That is what flangers are for, is it?

A. Yes.

Q. What do you mean by a flanger, in that connection?

A. It is a machine used to fasten to the engine to clean out the snow.

Q. And where is it fastened to the engine?

A. The front end.

Q. What is a flanger, something in the nature of a snow-plow, is it?

A. Yes, same order.

Q. So that so far as snow being on the tracks is concerned, is it your testimony that that is not the duty of

the section men, but that that work is done by the flanging movements?

Mr. Davis: Objected to as leading and suggestive—extremely so.

The Court: The witness may answer. He has already so testified, as I understand it, in substance.

Mr. Davis: Then, I object as repetition.

(Exception by plaintiff.)

(Last question read.)

A. Yes, done by flanging movements.

[fol. 141] Q. Mr. Raasch, what other work were you doing besides cleaning out the snow there in connection with the derailment of the car?

A. We were unloading ties out of the car, to balance it.

Q. I didn't get the last part there.

A. We were unloading the ties out of the cars—out of the car.

Floyd Maurer, called on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Where do you live?

A. Cloverton, Minnesota.

Q. How long have you lived there?

A. Five years.

Q. What is your occupation?

A. I work on the section, section labor.

Q. How long have you worked on the section?

A. It will be four years the 12th of January.

Q. You have worked all of that time on the section there at Cloverton?

A. Yes, sir.

Q. Were you there on the day that Mr. Moquin was injured at Cloverton?

A. Yes, sir.

Q. At the time of the derailment of that car, where were you?

A. We were down at the west end of the section waiting to unload ties.

[fol. 142] Q. Waiting for the train to come along there?

A. Yes.

Q. When the train came along and passed you by, what did you do?

A. After the train passed by, you mean?

Q. Yes.

A. We went back to Cloverton.

Q. What did you see when you got back to Cloverton?

A. When we got back to Cloverton we seen the derailed car.

Q. Where was that car derailed, what place in the station yards there?

A. It was on the house track.

Q. What place on the house track?

A. It was east of the crossing. It would be east of the crossing.

Q. Was it also east of the depot?

A. Yes, a little east.

Q. I take it that you, like the other railroad men, are referring to east as the track going towards Superior?

A. Yes, sir.

Q. Running in an easterly direction?

A. Yes, sir.

Q. And the track going towards Dresser Junction running in a westerly direction?

A. Yes, sir.

Q. So far as the real directions are concerned, it is north going towards Superior?

A. Yes, sir.

Q. The car was derailed just east of the depot, was that [fol. 143] about the point as shown here "Marks on West Rail"?

A. Yes, sir.

Q. Did you notice the marks there on the rail where the car was derailed?

A. I didn't take no particular notice to it.

Q. When you got down to that place, could you see where the car had gone off the rail, could you see that from the marks in the snow?

A. Marks in the snow.

Q. About how far would you say the car traveled after it left the rails until it stopped with the front end down into or across the ditch?

A. I couldn't say.

Q. The front end of that car was out in the ditch, was it, or across the ditch?

A. It was across the ditch.

Q. After it had stopped?

A. After it had stopped.

Q. What did you men do there at the place of derailment, did you clean out that place?

A. We cleaned out that place, some of it, that afternoon.

Q. The track?

A. Yes.

Q. What did you find there?

A. Snow.

Q. Was there any ice anywhere along that track?

A. I didn't notice any.

Q. And did you notice any hard or packed snow? If [fol. 144] you did, tell us where you noticed the snow?

A. The hard packed snow where we noticed was where the train had backed in, the car went over.

Q. You mean the snow that had been packed down by the wheels of the car?

A. Yes.

Q. Outside of that snow that had been packed down with the wheels of the car, was there any snow or was there any hard snow or ice along that track?

A. No, sir.

Q. You helped there to clean out that place so that the car could be re-railed?

A. Yes, sir.

Q. Did you use any picks that afternoon in cleaning out the track?

A. That afternoon?

Q. Yes.

A. No, not in the afternoon.

Q. Did you use any picks the next morning?

A. The next morning.

Q. Why did you use the picks the next morning or for what work did you use them?

A. Just on the outside of the rail along to fix a place to put the chains on to put the car back on, on the outside.

Q. Had it frozen during the night, do you remember?

A. Yes.

Q. That was a cold night, was it?

A. Yes, cold night.

[fol. 145] Q. I understood you to say that you used the pick on the outside to what? What was it you said there?

A. To put the chains under the rail to get the—I don't know what they call the thing that they run the cars upon.

Q. You mean the wrecking frogs?

A. The wrecking frogs.

Q. Just tell us in your own way what you did there, and what you needed the picks for?

A. To pick through the hard ice which was froze under the rail to get a chain through for to hold those frogs tight to pull the cars up on.

Q. And where were the frogs placed?

A. They would be placed in the inside.

Q. When did you do that?

A. That was in the afternoon—oh, the next forenoon.

Q. Was there a train there at that time or not?

A. Not right at that time. The train——

Q. Oh, you were getting ready——

A. Yes.

Q. —to have the car re-railed when the train would get there?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. This work was done with the picks, then, in order to set the frogs right for the re-railing of the car?

A. Yes, sir.

[fol. 146] Q. Was that the only purpose for which you used any picks?

A. Was there any other purpose, you say?

Q. Was that the only purpose?

A. Yes, sir.

Q. Do you have to slip a chain under the rail in order to put those frogs in the proper position?

A. No, this what we dug down was to dig down under was to lay this car down for the car to go on.

Q. To lay the frogs down for the car?

A. Yes.

Q. Well, what was the chain used for? Do you remember about that?

A. No, I don't.

Q. There was a chain there used for something, was there?

A. There was a chain, but what it was for I don't know.

Q. But you do now have some recollection of a chain being used?

A. Yes.

Cross-examination.

By Mr. Davis:

Q. Did I understand you to say that you used the picks on the outside of the rails?

A. On the outside of the rails?

Q. Yes.

A. Yes, sir.

Q. Did I understand you to say that that is the only place you used the picks, on the outside of the rails?

[fol. 147] A. Yes, sir.

Q. You didn't use them on the inside of the rails at all, then?

A. No, sir.

Q. And nobody else did while you were there?

A. No, sir.

Q. And nobody picked out anything on the inside of the rails while you were there?

A. No, sir.

Q. And no pick was used on the inside of the rails all the time that you were there working?

A. No, sir.

Q. And you were working all that afternoon with them, weren't you? That is, you got there about 3:30 and worked till 5 that evening?

A. I don't remember.

Q. Do you remember getting there that afternoon?

A. Yes.

Q. About what time would you say?

A. I don't know really what time it was.

Q. Do you know how long you worked there that afternoon, how many hours?

A. I don't have no idea. I didn't keep track.

Q. Have you an idea how many hours you worked there?
A. I should judge about a couple hours.
Q. Then you started work in the morning, did you? The next morning you started work?
A. Yes, sir.
Q. Now, in the afternoon did you use the picks on the outside of the rails?
[fol. 148] A. What, in the forenoon?
Q. In the afternoon of the first day?
A. No.
Q. Or on the inside?
A. No.
Q. And you never used a pick on the inside or nobody else did while you were there?
A. No, sir.
Q. You are sure about that?
A. Yes, sir.
Q. So that whatever snow there was there that you took out, you took out with a shovel, on the inside of the rails?
A. Yes, sir.
Q. Clear through that twenty-five feet?
A. Yes, sir.
Q. It was soft snow that you could handle with a shovel?
A. Yes, sir.
Q. Didn't need a pick at all?
A. No, sir.
Q. You are sure of that?
A. Yes, sir.

C. M. Monson, a witness on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Where do you live?
A. Cloverton.
Q. How long have you lived at Cloverton?
[fol. 149] A. About ten years.
Q. What is your occupation?
A. At the present time section labor.

Q. How long have you worked on the section there?
A. About three years.
Q. Have you worked all of that time at Cloverton?
A. Yes, sir.
Q. You were working on the section, were you on the day that Mr. Moquin was injured?
A. Yes, sir.
Q. You saw that car derailed there, did you?
A. Yes, sir.
Q. You saw that the car was derailed?
A. Yes, sir.
Q. Where were you when the train came in?
A. On the west end of our section.
Q. Down there with the rest of the section crew?
A. Yes, sir.
Q. After the train passed by down to the west end of the section you came back to Cloverton, did you, with the rest of the crew?
A. Yes, sir.
Q. Did you then go over to the place where the car was derailed?
A. Yes, sir.
Q. What did you see there?
A. We could see the cars that were derailed and the drift of snow there.
[fol. 150] Q. Could you tell where the car went off the rails?
A. Yes, sir.
Q. Saw the tracks?
A. Yes, sir.
Q. There were tracks in the snow, were there?
A. Yes, sir.
Q. What would be your estimate of the distance between the place where the marks started, that is, showing where the car went off the track, up to where the car finally landed?
A. I would say between half a car length and a car length.
Q. Did you men who were on the section then clear out that place?
A. Yes, sir.
Q. Under the car?
A. Yes, sir.

Q. Were there two cars left there?
A. Two cars, yes, sir.
Q. That is, the car that was loaded with ties?
A. Yes, sir.
Q. Then, was there also an empty car there?
A. Yes, sir.
Q. Where was that empty car?
A. It was coupled next to the car of ties.
Q. On which side?
A. That would be on the west end.
Q. On the west?
A. Yes, sir.
Q. Did you have to shovel out under the car there before you could re-rail it?
[fol. 151] A. Yes, sir.
Q. Under one or both of those cars?
A. Under the one that the ties were in, and partly under the other one.
Q. About how far up under the other car?
A. Almost the whole length of the car.
Q. How did you do that work?
A. By using shovels.
Q. Did you use any picks there on the day that that car was derailed?
A. No, sir.
Q. You just used your shovels?
A. Yes, sir.
Q. How did you use the shovels under the car?
A. We shoveled under the side of the cars first and then we, we might say, crawled around and got the rest of it.
Q. How much of a snow bank was there?
A. I would say from eighteen to twenty-four inches.
Q. And what would you say was the length of that snow bank?
A. I couldn't say.
Q. How long was it along the track?
A. I couldn't say.
Q. I think you said that under that empty car the snow ran almost the full length of that car, didn't it?
A. Yes, sir.
Q. How did the snow run under the car that was derailed?

A. I don't remember.

[fol. 152] Q. Could you tell us in rail lengths what was the length of that snow drift there?

A. No, sir, I could not.

Q. What did you find there when you shoveled out to clear that away?

A. Snow was the only thing we found.

Q. Did you find any ice there?

A. No, sir.

Q. Did you find any packed snow?

A. The only packed snow we found was where the wheels of the car had traveled before they left the track.

Q. And outside of that snow that was packed down with the wheels, was there any hard or frozen snow or any ice anywhere along that track?

A. No, sir.

Q. Either at the place where the wheels first went off the track or anywhere along to where thec ar finally landed?

A. No, sir.

Q. There was a snow bank that was there without ice, was it?

A. Yes, sir.

Q. Did you also help unload the ties there out of that——

A. Not that day, no.

Q. Not that day, but the next day?

A. Yes, sir.

Q. So that you men were around there more or less of the time until the car was finally re-railed, were you?

A. Yes, sir.

[fol. 153] Q. And do you remember anything about a chain being used there?

A. The only chain I remember of them using was a chain they used to hook on the truck to keep it from swinging back off the tracks.

Q. I don't know that I quite understand that.

A. They hooked the chain on the rail and on the truck of the car to keep it from following the ditch to go back out off the track.

Q. As I understand it, the front truck had not only left the rails, but had gone completely off the track out into the ditch?

A. Yes, sir.

Q. Or perhaps across the ditch?

A. Yes, sir.

Q. And the rear truck was still up on the track or on the bed of the track, on the ties, am I right about that?

A. Well, what do you mean by the front trucks and the rear trucks?

Q. Well, by the front trucks, I was referring to that end of the car that had left the track first.

A. That would be the east end, then?

Q. Be the east end, yes. The east end was entirely away from the track?

A. Yes, sir.

Q. And the west end of that car was still up on, or at the track?

A. Yes, sir.

Q. And what end of the car was the chain fastened to?

A. I don't remember that.

[fol. 154] Q. But your recollection is that a chain was fastened around the track and then tied to the car?

A. Yes, sir.

Q. As you understood it, to keep the car from following the ditch?

A. Yes, sir.

Q. Did you use picks there in doing that work, getting ready for the re-railing of that car, Mr. Monson?

A. We did the next morning.

Q. Where did you use those picks and for what purpose?

A. We used it where the wheels of the car had traveled before they left the track for the ditch. That was on the outside of the north rail and on the inside of the south rail.

Q. And did you use the picks for any other purpose?

A. No, sir.

Q. Do you remember whether or not a pick was used in connection with the fixing of that chain under the track?

A. I do not.

Q. Do you mean to say that a pick was not used for that or that you don't remember whether it was?

A. I don't remember.

Q. Was it a cold night, did it turn cold that night?

A. Yes, sir.

Q. Froze during the night?

[fol. 155] A. Yes, sir.

Q. Was there any ice at all between the rails there?

A. Not any more than what usually accumulates on a railway in the winter-time.

Q. What do you mean by that?

A. Well, there is always some ice forms on days it thaws, you know.

Q. And where was that?

A. That is right on top of the ties.

Q. Oh, you mean the ice that had formed right on top of the ties?

A. Yes, sir,

Q. Well, how thick or how deep was that, with reference to the top of the rail?

A. Well, it would probably be about two inches from the top of the rail.

Q. Would the flange of the wheel come anywhere near that ice?

A. No, sir.

Cross-examination.

By Mr. Davis:

Q. After the derailment you were working with the foreman, weren't you, Mr. Raasch?

A. Yes, sir.

Q. When you shoveled the snow out in the afternoon, you nor Mr. Raasch never mentioned that there wasn't any ice there, did you?

A. I don't understand the question.

Q. You were shoveling snow in the afternoon, weren't you?

[fol. 156] A. Yes, sir.

Q. Mr. Raasch never mentioned to you or said a word to you that there wasn't any ice there, did he?

A. Not that I remember.

Q. You never said a word to him that there wasn't any ice there, did you?

A. I don't believe I did.

Q. And did you mention to Mr. Raasch the next day that there was ice between the rails that had accumulated,

not any more than accumulates in the winter-time, did you say that to Mr. Raasch the next morning, call his attention to that ice?

A. No, sir.

Q. Did he say anything to you about the ice that accumulates there in the winter-time?

A. No, sir.

Q. You just glanced at it, you don't know how close it came by measurement to the top of the rail, do you?

A. No, sir.

Q. Did you use picks to get that ice out? You did have to, didn't you?

A. No, sir.

Q. What did you use to get it out with—a shovel?

A. It wasn't necessary to remove that ice.

Q. Didn't remove any of it?

A. No, sir.

Q. Didn't touch that ice at all, no part of it? Did Raasch tell you not to remove the ice?

A. No, sir.

[fol. 157] Q. Was he there when you saw that ice?

A. Yes, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Did he ever say to you that there wasn't any ice between the tracks, between the rails?

A. I can't say.

Q. Did you talk with him about that, that there wasn't any ice between the rails ever at any time in your life?

A. Yes, sir.

Q. When was the first time you talked with him about the ice between the rails? The day after the accident?

A. Oh, I couldn't say the exact time, but some time afterwards.

Q. Is that your best judgment?

A. Yes, sir.

Q. Did he bring the subject up or did you bring the subject up? Did he say, "Now, you must remember that there wasn't any ice between the rails" or did he say, "You don't remember it," or who brought the subject up?

A. I don't know.

Q. What is your best recollection?

A. I couldn't say as to that either.

Q. Did he say to you that you should remember that there wasn't any ice between the tracks?

A. No, sir.

Q. But he did mention the matter about ice between the tracks to you, did he?

A. Yes, sir.

[fol. 158] Q. You think that was the day after the accident?

A. I don't know.

Q. How soon afterwards, if you don't know the exact day; was it the next day or the second day following the accident?

A. It might have been the next day.

Q. Can you tell the jury any reason why he would mention about there being ice between the tracks?

A. The only reason being a discussion of what caused the de-railment.

Q. What did he say about that ice? Do you remember what he said?

A. The only thing I remember him saying about the ice was that there wasn't enough of it there to cause a de-railment.

Q. Who said that, Mr. Raasch, the foreman?

A. Yes, sir.

Q. That was the day of the accident or the day following the accident that Raasch said there wasn't enough ice to cause the accident?

A. The day following, yes, sir.

Q. Then he was right there when there was ice between the tracks, wasn't he? That is true, isn't it? Between th rails there?

A. Yes, sir.

Q. And saw that ice?

A. Yes, sir.

Q. And discussed it with you?

A. Yes, sir.

Q. And told you to remember that there wasn't enough [fol. 159] ice to de-rail the car, didn't he?

A. He didn't tell me to remember it, no, sir.

Q. But he told you there wasn't enough to de-rail the car?

A. Yes, sir.

Q. You are sure of that, aren't you?

A. Yes, sir.

Q. You heard him on the stand, didn't you?

A. Yes, sir.

Q. You heard him testify that there wasn't a bit of ice there, didn't you? You heard him testify that way?

A. Yes, sir.

Q. And you know that there was, don't you?

A. Yes, sir, some.

Q. The amount that usually accumulates in the winter time?

A. Yes, sir.

Q. And the longer the winter the more it accumulates, isn't that true?

A. Well, it all depends on the weather.

Q. Yes, but the colder the weather and the longer the winter the more it accumulates, that would be true, wouldn't it?

A. To a certain extent, yes.

Q. Yes, and Mr. Monson, how many people had picks there, all of you? All of you had picks?

A. I don't know.

Q. You had one?

A. I used one some, yes.

Q. You saw Mr. Maurer use one, didn't you?

[fol. 160] A. No, I wasn't paying any attention to what he was doing.

Q. Did you see the foreman use a pick?

A. Not that I remember.

Q. You would not say you were the only man that had a pick and used it there, would you?

A. No, sir, I would not.

Q. As a matter of fact, you all had picks there, didn't you, as a part of your equipment?

A. Yes, sir.

Q. You use them when you get ice to pick out from under the cars and under the rails?

A. Yes, sir.

Q. That is one of the things you use picks for?

A. Yes, sir.

Q. After this accident who was the next person that you ever talked to, and when, about the ice between the rails?

A. The claim agent.

Q. Before coming into court or what?
A. The claim agent.
Q. Who is he?
A. McCarthy.
Q. Is he here now?
A. Yes, sir.

Mr. Davis: Will you kindly stand up, Mr. McCarthy?

(Man stands up in court room.)

Q. And when did you talk to Mr. McCarthy, the claim agent?
A. It was the first part of October, I think.
Q. So you didn't have any occasion to recall the things [fol. 161] or talk with anybody from February to October, did you?
A. No, sir.
Q. Did you tell him that there was ice between those tracks?
A. I told him the same as I told you, there was very little ice there.
Q. Did you tell him that there was ice between the rails?
A. Yes, sir.
Q. You are sure of that?
A. Yes, sir.
Q. And he said to you, "Well, now, the foreman says there wasn't any," didn't he?
A. No, sir.
Q. Didn't he tell you the foreman had told him there wasn't any ice there?
A. No, sir, he didn't tell me anything like that.
Q. Didn't tell you anything?
A. No, sir.
Q. He never came to get a statement from you, did he, until October after this accident?
A. No, sir.
Q. That was last October?
A. Yes, sir.
Q. This car of ties was loaded full with ties, wasn't it?
A. Yes, sir.
Q. Clear to the top?
A. Yes, sir.

Q. The more it was loaded the heavier it would make the car?

[fol. 162] A. Yes, sir.

Q. And about how much of the car did you unload?

A. We unloaded about fifty ties.

Q. How many ties would there be on that car, do you know?

A. I don't know.

Q. About how many?

A. Oh, I would say between three and four hundred.

Q. And do you know about how much one of those ties weigh-?

A. No, sir.

Q. Have you any idea?

A. No, sir.

Q. And you only unloaded about fifty of them?

A. Yes, sir.

Redirect examination.

By Mr. Boyle:

Q. There was one question there Mr. Davis asked you about, Mr. Monson, whether or not the foreman told you that there wasn't enough ice there to have de-railed the train; what was your own impression about it?

Mr. Davis: Oh, that is objected to as calling for a conclusion of the witness and no foundation laid,

The Court: Objection sustained.

(Exception by defendant.)

Q. So far as the top of the ice that you refer to was concerned, was that up anywhere near high enough from [fol. 163] the top of the rail to touch the flange of the wheel?

Mr. Davis: That is objected to as calling for a conclusion of the witness. I think the fact should be shown as to how high it was and then the jury draw their own conclusions as to whether or not it was. Leading and suggestive in the extreme, your Honor.

The Court: The witness may answer the question.

(Exception by plaintiff.)

(Last question read.)

Mr. Davis: If you know.

A. No, sir, it wasn't.

Recross examination.

By Mr. Davis:

Q. You didn't measure how far below the ball of the rail it was, did you?

A. No, sir.

Q. You just looked at it and you are giving your best guess?

A. Yes, sir.

Q. And that is all?

A. Yes, sir.

Q. It might have been an inch below the ball of the rail in some places, isn't that true?

A. No, sir.

Q. You looked it all over carefully and you know it wasn't any inch below the ball of the rail?

A. Yes, sir.

Q. Did you measure it?

[fol. 164] A. No, sir.

Q. Just by looking at it you could tell?

A. Yes, sir.

Adjourned to 9:00 o'clock A. M. of Tuesday, May 21, 1929.

Pursuant to adjournment theretofore taken, court reconvened at 9:00 o'clock A. M. Tuesday, May 21, 1929.

(A recess was thereupon taken until 10:00 o'clock A. M. of the same day for medical examination of the plaintiff.)

E. M. Rennie, called on behalf of defendant, previously sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. You have already testified in this case that you were the conductor on the train on which Mr. Moquin was working at the time he was injured, that is correct, is it?

A. Yes, sir.

Q. Where did that train start from?

A. Belknap Yards, Superior.

Q. Then as you started along the route did you get a message with reference to flanging out the tracks?

A. Yes, sir.

Q. Is Defendant's Exhibit "3," the message which you received?

A. Yes, sir.

[fol. 165] Q. I notice that is signed "J. E. M."; who is J. E. M.?

A. That is Mr. J. E. Mullen, the chief train dispatcher.

Q. And this is addressed to "conductor No. 51"; was your train No. 51?

A. Yes, sir.

Q. And you were the conductor on that train?

A. Yes, sir.

Mr. Boyle: We will offer in evidence Defendant's Exhibit "3."

Mr. Davis: No objection, your Honor.

The Court: Received.

Mr. Boyle: "Finish flanging on No. 50 Tuesday," what does that refer to, Mr. Rennie?

A. I couldn't do it all on Monday and finish the division on Tuesday.

Q. Would that be on the return trip?

A. On the return trip.

Q. Your train on the return trip would be No. 50, would it?

A. Yes, sir.

Q. How long had you been running on that particular route?

A. Nine years.

Q. Mr. Moquin was the rear brakeman on your train?

A. On this date, yes, sir.

Q. On that day and Mr. Dan Carr, I understand, was the head brakeman?

A. Yes, sir.

[fol. 166] Q. How long had those men been working with you?

A. I can't give the exact time; three to five years.

Q. On this same run?

A. Yes, sir.

Q. How long did you know Mr. Moquin?

A. About nine years.

Q. How long did you know Mr. Carr?

A. About the same length of time.

Q. And did you know that Mr. Moquin held senior right?

A. Yes, sir.

Q. So far as the brakemen were concerned. What is meant by the head breakmen and what is meant by the rear brakemen?

A. The head brakeman is the brakeman that works on the head end of the train where the engine is and the rear brakeman is the brakeman that works on the rear of the train, rides in the caboose and protects the rear end of the train.

Q. When you received the telegram, Defendant's Exhibit "3," where were you at that time?

A. Boylston Junction.

Q. After you received that telegram did you see and have a talk with Mr. Moquin and with Mr. Carr?

A. Yes, sir.

Q. What is your recollection as to whether or not those men were together during that conversation; that is, whether the three of you were there or whether you talked with each one separately?

[fol. 167] A. I cannot say. I don't remember.

Q. Did the conversation take place at Boylston Junction?

A. Yes, sir.

Q. What was the conversation that you had with Mr. Moquin at that time?

A. I couldn't recall the conversation.

Q. Did you refer to the telegram or read the telegram?

A. Yes, sir.

Q. What did you do in that regard?

A. Why, when those messages are received I always instruct all the men affected of the work that is to be done and I told them that we would have to flange all places as instructed by the dispatcher.

Q. Did you make that statement to both Mr. Moquin and Mr. Carr?

A. Yes, sir.

Q. What is your recollecton as to whether or not you read the telegram to them or showed them the telegram?

A. I either told them or showed it to them. Generally we give the telegram with the orders and clearances to all men affected.

Q. Then when you left Boylston Junction what is your recollection about where the first flanging out work was done?

A. Black River.

Q. Did you take any part in that flanging out work?

A. No, sir.

[fol. 168] Q. Did you after you called this telegram to the attention of Mr. Moquin and Mr. Carr give any further orders regarding flanging out movements?

A. No, sir.

Q. Then do you remember whether or not any flanging out was done after that first station?

A. Yes, sir.

Q. At what point?

A. Patzau was the next point.

Q. And did you take any part in that or give any instructions with reference to that flanging out?

A. No, sir.

Q. And then where was the next flanging out done?

A. At Harlis, Minnesota.

Q. And did you give any instructions with reference to that flanging out or take any part in it?

A. No, sir.

Q. And then where was the next flanging out done?

A. At Belden, Minnesota.

Q. And was the same thing true there, did you take any part in it or give any instructions with reference to it?

A. No, sir.

Q. Why didn't you take any part in those other flanging out movements or give any instructions with reference to them?

A. Because both men were experienced men in my employ for years before and had done this work under my instructions several times and knew exactly how it was to [fol. 169] be done.

Q. Did you know at that time that both of these men were conductors, had been promoted to the position of conductors?

A. Yes, sir.

Q. And then after you left Belden, where was the next station that there was any flanging work to be done?

A. Kingsdale, Minnesota.

Q. And was some flanging done there?

A. Yes, sir.

Q. Did you take any part in it or give any instructions with reference to it?

A. No, sir.

Q. And then the next point?

A. Cloverton, Minnesota.

Q. That is the place where this accident occurred, is it?

A. Yes, sir.

Q. What time was it when your train pulled in to Cloverton?

A. A little after one o'clock or about one o'clock.

Q. Was that about the correct time of the train?

A. Yes, sir—not the correct time for the train; time card time.

Q. What is your recollection about what kind of a day it was, whether it was clear, warm or cold or otherwise.

A. It was a clear, moderately warm day.

Q. When you got into Cloverton where did the train stop?

[fol. 170] A. It made a momentary stop at the station platform.

Q. And what was done at station platform?

A. I stepped off from the caboose and I got a message and we moved on over the crossing to the west end of the main line, west passing track switch.

Q. And you did get off the caboose there?

A. Yes, sir, I got off at the station platform.

Q. What is your recollection as to whether any work was done there at the station before you pulled up to clear the highway?

A. There wasn't any work done.

Q. When you got off the train what did you do?

A. The agent said he didn't have any freight to load and he handed me a message and I signalled to pull ahead over the highway crossing and got back onto the caboose again.

Q. Then did you ride on the caboose from that point up to where the train cleared the crossing?

A. Yes, sir.

Q. Where was Mr. Moquin at that time?

A. He got off from the caboose and was on the station platform.

Q. Did you have any conversation with Mr. Moquin at that time?

A. No, sir.

Q. Did Mr. Moquin get back on the caboose when the train pulled up to clear the crossing?

A. No, sir.

Q. Did you have any conversation with Mr. Moquin from that time on until the time of the accident in which he [fol. 171] was injured?

Q. Did you make any inspection of the house track or give any orders regarding flanging out movements to be done at Cloverton?

A. No, sir, farther in the morning.

Q. You mean at Boylston Junction?

A. Yes, sir.

Q. The general order that you have already referred to?

A. Yes, sir.

Q. What was the next thing that happened there at Cloverton?

A. I was looking my freight bills over for billing, to change billing on cars, according to the message that the agent gave me, and I was writing, inserting the change of billing on the way bills, when Mr. Carr came into the caboose hurriedly and advised me that Moquin had been hurt.

Q. What did you do then?

A. I immediately went to the depot where he was.

Q. Mr. Moquin had already been taken to the depot, had he?

A. Yes, sir.

Q. What took place at the depot, what did you do there? What conversation did you have with Mr. Moquin, if any?

A. I went into the depot and asked him what happened to him.

Q. What did he say?

A. Why, he said that he had been hurt, thrown from the [fol. 172] car. I can't recall all the conversation.

Q. Do you recall any other part of it?

A. I asked him how bad he was hurt and he said he didn't know, he thought there were several bones broken the way he felt, and his back was injured. He was having pains all over his body.

Q. What else did he say, if anything?

A. Something about that we would have to get a doctor and we was talking about it and he said that he was afraid that something would happen backing in there.

Q. Did you have any further conversation about that with Mr. Moquin?

A. No, only just talking what we would do with him, asked him what he wanted to do, be taken to Minneapolis or taken home to the hospital.

Q. But he said at that time to you that he was afraid something would happen backing in there?

A. Something to that effect. I cannot recall the entire conversation.

Q. Do you remember anything else about the conversation that took place at the depot?

A. Why, I remember that he spoke about that his ankle was hurt similar to an injury he had had before and that—well, his condition. We talked of his condition.

Q. Yes.

A. And I asked him where he was and he said he was thrown from the top of the car, and, of course, he explained how he was thrown from the car, that he was standing on top of it and was thrown bodily so that he struck on his feet [fol. 173] and then on his body and his back and of course, I had to ask him all those questions to make out my form 171 and we talked that over in a moment or two there and I can't recall all that passed.

Q. What did you do after that conversation with Mr. Moquin?

A. I went into the office and wired the chief train dispatcher of his injury and notified the chief dispatcher to get a doctor for first aid at Markville, advising that I believed it was the best thing to do to take him to Markville where the doctor could give him first aid, it was the nearest doctor, and that he wished to be taken to Superior and to stop our fast train, No. 62, to pick him up and to notify his wife and have an ambulance at the depot at Superior to take him to the hospital.

Q. What did you do then?

A. I received instructions from the dispatcher to take him to Markville for first aid and that he would stop 62, and take him to Superior, and I told Mr. Carr to go over and take the engine and come out and couple onto the train and back the caboose up to the depot that we could load Mr. Moquin into the caboose.

Q. That was done, was it?

A. Yes, sir.

Q. And the train went on to Markville?

A. Yes, sir.

Q. With Mr. Moquin in the caboose?

A. Yes, sir.

Q. Did you at that time go over to the place of de-rail-
[fol. 174] ment, the place where the car went off the track?

A. While I was waiting for an answer from the dispatcher I just ran over and looked at the place where Mr. Moquin had fallen.

Q. Did you make any inspection at that time to try to determine what was the cause of the derailment?

A. No, sir.

Q. Did you notice at that time, whether there was any snow on the passing track? I mean the track between the main track and the house track.

A. I had looked at it before so I didn't look at it then.

Q. Had you made any inspection at all of the house track before this accident?

A. No, sir.

Q. To determine whether or not or how it should be flanged out or anything like that?

A. No, sir.

Q. Was there any snow on the passing track?

A. Not very much.

Q. Do you know or remember whether or not there were any cars stationed on the passing track?

A. There wasn't any.

Q. Mr. Rennie, did you go back over this route the next day?

A. Yes, sir.

Q. Did you take part in the work of putting that car back on the track again?

A. Yes, sir, I over-seen the re-railing of it.

Q. There has been some testimony about the use of a
[fol. 175] chain out there in conection with the re-railing of that car, can you explain how that chain was used or why it was used? If you remember that please explain it to the court?

A. Well, the leading truck, the east truck of the car, had de-railed.

Mr. Fryberger:

Q. Which car, Mr. Rennie?

A. The car of ties, the east car. The east truck of the east car when de-railed had left the track entirely, the grade

of the track; and went over a small ditch, out almost diagonally or forty-five degrees from the track and the west truck of this car had the east set of wheels off the track and turned almost in the direction the car had gone, but the west set of wheels were still resting on the rail, but not straight, they were diagonal, and in order to re-rail the car it was necessary to what we call slew the trucks. In order to slew the trucks we had to chain them in some way. I had the section men dig a hole underneath the rails between the ties where I could put a chain and hook it.

Q. Hook it under the rail?

A. Hook it under the rail as a stationary object to pull on. Then I wrapped the other end of the chain around the oil box of the car and by pulling the car that chain to the oil box would slew the trucks and bring the wheel that was off the track up against the rail. That is what the chain was used for.

Q. There was some reference made to the use of frogs [fol. 176] or camel backs to re-rail that car?

A. Yes, sir.

Q. Just what are those frogs?

A. Why, they are called re-placing frogs or camel backs. The flange of the wheel being an inch and a quarter lower than the tread, you have to raise it from the ground over the rail so that the flange will be inside of the rail and you have to have something that will raise it and we have a replacing frog that is called a camel back or replacing frog that you place close to the rail and spike it to the ties and when the wheel comes to that replacing frog it raises the flange high enough above the rail so that the flange will slip over the rail on the inside.

Q. And was that done in this instance in re-railing the car?

A. When the truck was slewed and the car was drawn back so that the wheels were alongside of the rail, these replacing frogs were spiked down and the car pulled on top of them; then the wheels slid over onto the rail.

Q. When you say spiked down do you mean that the frog was spiked to the ties?

A. Yes, sir, we have to clean everything out so that the frogs can lie on the ties and spike them so they won't slip.

Q. That is, you have to get right down to the tie itself, down to the wood?

A. Yes, sir.

Q. In order to place that rerailing frog?

A. Yes, sir.

[fol. 177] Q. And that has to be spiked so it won't slip away?

A. It does on heavy loads. You can re-rail them on empties. There are little lugs on them that will settle into the ties on an empty, but on a load they have to be spiked.

Q. And on this re-railing work you figured it was necessary to spike the frog to the ties, did you?

A. Yes, sir.

Q. And that was done in this case?

A. Yes, sir.

Q. Did you at any time before the accident in which Mr. Moquin was injured, have any conversation with the head brakeman, with Mr. Carr, after you got into Cloverton?

A. Why, I probably did. I can't recall.

Q. I mean before the accident?

A. At Cloverton?

Q. Yes.

A. No.

Cross-examination.

By Mr. Davis:

Q. This order was given to you as conductor in charge of the train, was it not?

A. Yes, sir.

Q. And you as conductor had charge of the fulfillment of that order?

A. Yes, sir.

Q. It was for you to determine under this order what stations you would flange going out and what stations you would flange coming in, wasn't it, as conductor?

[fol. 178] A. Yes, sir.

Q. When you talked to Mr. Moquin and Mr. Carr at—where was it you talked to them about this order?

A. Boylston Junction.

Q. You stated to the jury you did not recall the conversation you had with them, is that correct?

A. I cannot recall all of it, no, sir.

Q. Do you recall any of it?

A. All I recall is that I told them to fulfill the order.

Q. Fulfill the order, that is all you remember telling them?

A. Yes, sir.

Q. You would recollect anything else you told them, wouldn't you, now?

A. I don't know.

Q. Well, you have talked this case over a good many times, haven't you?

A. Not particularly.

Q. You talked it over last night in a room with a number of witnesses, did you not?

A. About this flanging?

Q. About what you were going to testify to?

A. No, sir.

Q. Did you ever talk with anybody about what you were going to testify to before you came on this stand here today?

A. No, sir.

Q. Never at any time?

A. No, sir.

[fol. 179] Q. Never told anybody anything that you knew about the case until you were called to the stand here today, is that true, Mr. Rennie?

A. Investigation, we talked about the——

Q. Outside of the investigation, from the time of the investigation to the present time have you talked to anybody till you took that stand here this morning, Mr. Rennie?

A. Certainly.

Q. Who?

A. Several people.

Q. Yes. Now, then, you have tried to recall everything you said to Mr. Carr and Mr. Moquin at Boylston Junction, haven't you?

A. No, sir.

Q. Haven't tried to recall it?

A. Not everything.

Q. Well, the only thing you can now recall is what you now tell the jury is what you said, fulfill the order?

A. Why, certainly.

Q. And you showed them this order?

A. Yes, sir.

Q. That is the only instruction you gave them that you can remember now, isn't it?

A. Yes, sir.

Q. Your train when it came into Cloverton was how late?

A. Probably three or four hours.

Q. And I presume when your trains are late you are the one in charge of that train to determine what work you [fol. 180] will do and when you will leave, that is your duty, isn't it?

A. If I want to cut any of it out.

Q. I say it is your duty to determine when you leave and what work you will do at every station?

A. Yes, sir.

Q. And you were how late, you say three hours?

A. Yes, sir.

Q. And as you went to these stations, arriving first at Black River, the flanging was done there?

A. Yes, sir.

Q. And at Patzau and flanging was done?

A. Yes, sir.

Q. And Harlis?

A. Yes, sir.

Q. And Belden?

A. Yes, sir.

Q. And Kingsdale?

A. Yes, sir.

Q. And then you arrived at Cloverton three hours late?

A. Yes, sir.

Q. Now, isn't it a fact, Mr. Rennie, that when you are late, and especially three hours late, your brakemen frequently come to you and ask you what they should do, isn't that true?

A. No, sir.

Q. Your brakemen when you are late never come to you and ask you what to do, do they?

A. No, sir.

Q. In all your experience as a conductor on the Soo railroad where your train has been from two to three hours [fol. 181] late, no brakeman has ever come to you to ask you whether you are going to do certain work or not, has he?

A. I cannot recall.

Q. Not in all your experience as a conductor?

A. Hardly with twenty-eight years.

Q. And you are in charge of the train, aren't you?

A. Yes, sir.

Q. You heard Mr. Moquin on the stand say he came to you and asked you whether you wanted to flange the tracks at Cloverton. You were three hours late?

A. Yes, sir.

Q. Do you mean to say that he didn't or you don't remember whether he did or not?

A. I say he did not.

Q. He didn't talk with you?

A. No, sir.

Q. You would tell this jury he lied about that, wouldn't you?

Mr. Boyle: This is objected to as not proper cross examination, if the court please.

Mr. Davis: I think it is.

Mr. Fryberger: Insulting.

The Court: Overruled, as not proper cross examination.

(Exception by defendant.)

Q. Your answer?

A. What is the question?

Q. You would tell this jury then, that he lied about it, wouldn't you? Mr. Moquin lied when he said he asked [fol. 182] you whether he should flange the tracks at Cloverton?

A. Yes, sir.

Q. Yes. Now, then, it was your duty when you found that Mr. Moquin was injured—you found him at the depot?

A. Yes, sir.

Q. And what was the first thing you said to him?

A. I asked him how he was hurt.

Q. What did he say?

A. He told me he was thrown off of a car.

Q. What then did he say about how the car was thrown off, what else did he say about how the car was thrown off?

A. I don't know as he said.

Q. Well, Mr. Rennie, let us refresh your memory: Did not Mr. Moquin tell you that the car was de-railed because of the ice on the track, isn't that true?

A. No, sir.

Q. He didn't tell you that?

A. No, sir.

Q. Did you ask him how the car was de-railed?

A. No, sir.

Q. Did you ask him what caused the de-railment?

A. No, sir.

Q. No such talk took place?

A. No, sir.

Q. Well, wasn't it your duty as conductor, knowing that that de-railment took place, to find out the first thing of [fol. 183] all, under the rules, the cause of that de-railment?

A. After I rendered first aid, yes, sir.

Q. All right. You never did find out, as you have testified here, the cause of that de-railment that day, did you?

A. No, sir.

Q. And you went over there to the tracks and you said you made no effort to find out the cause of the de-railment, didn't you?

A. No, sir.

Q. You made no effort to find out right after that accident in which that man was hurt what caused the car to be de-railed, did you?

A. No, sir, I was getting him to first aid.

Q. Just answer my question. You ran over to the tracks; what did you go over there for if it wasn't to find out what de-railed that car? What other reason was there for you to go over there, Mr. Rennie?

A. I went over there to see where he had fallen.

Q. Well, that didn't help you in getting him first aid at all, did it? That didn't help you to give him any aid?

A. I was waiting for instructions from the dispatcher.

Q. Instructions as to what?

A. Where to take him.

[fol. 184] Q. Yes, but I say you went over to see where he had fallen; that didn't help you in determining the cause of the de-railment, did it?

A. I didn't have time to.

Q. But you had time to go over and see where he had fallen?

A. I stayed about a minute.

Q. I say you went over there and the only reason you went over there, as I understand you to tell the jury, is to

find out where he had fallen, to look at the place he had fallen?

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Q. No other reason for your going over there except to see the place he had fallen?

A. That is all.

Q. You did not then make any effort to ascertain the cause of the de-railment?

A. No, sir.

Q. Now, Mr. Rennie, as conductor in charge of that train, you were charged, under the rules, with knowing the condition of the tracks, were you not?

Mr. Boyle: This is objected to as not the best evidence.

Mr. Davis: Oh, I think it is, what he knows.

The Court: If he knows.

Mr. Davis:

Q. Well, do you know whether you are charged, under the rules, with knowing the condition of those tracks? Don't you know you were charged with knowing the condi-[fol. 185] tion of the tracks and that that was your duty as conductor?

A. No, sir.

Q. Mr. Rennie, when you saw him there in the depot let me ask you again, what was the first thing that was said between you and Mr. Moquin?

A. The first thing I asked him how bad he was hurt.

Q. Yes.

A. If I recall it.

Q. What was the next thing he said?

A. Told me how he was hurt.

Q. What did he say?

A. That his ankle—or that his legs hurt him, his back hurt him; he was kind of all jarred all over the body.

Q. What did you say then?

A. I asked him how it happened.

Q. What did he say?

A. He said he was thrown off of the car.

Q. What did you say then?

A. I don't remember just what I said exactly.

Q. Well, can you remember anything else you said or that he said?

A. Yes.

Q. What else?

A. He said that he was afraid something would happen backing in there.

Q. Had he told you how he backed in before that?

A. No.

Q. Had anybody else?

A. I knew how they had backed in.

[fol. 186] Q. Did you see them back in?

A. I understood the movement.

Q. Oh, you knew the movement was going to be to back in there with those cars; now, isn't the reason you understood that movement because you had told Moquin to tell Dan Carr to back in?

A. No, sir.

Q. Well, now, let us see, you didn't see them back in, did you? You didn't see them back in, did you, Mr. Rennie?

A. No, sir.

Q. And yet you mean to tell this jury that you understood the movement was that they would back those cars in there, is that correct?

A. I have been doing——

Q. Just answer my question.

A. Yes, sir.

Q. And you understood that they would back the cars through and then come through and flange the track, you understood that?

A. I did not.

Q. You understood what the movement would be?

A. Certainly.

Q. Well, then, you understood, as you say, that they would back the cars in?

A. If they decided to do so.

Q. Yes, if they decided to do so, you understood that?

A. If they decided to do so.

Q. Yes, if they decided to do so. You didn't see them back in?

[fol. 187] A. No, sir.

Q. Now, then, when this flanging was done, take it at Patzan——

A. Yes, sir.

Q. Did the engine back in on the track?

A. No, sir.

Q. At Harlis did it?

A. Yes, sir.

Q. At Back River, did it?

A. Yes, sir.

Q. At Belden?

A. Yes, sir.

Q. At Kingsdale?

A. Yes, sir.

Q. You saw that movement?

A. Yes, sir.

Q. And they would back in on the track and then come through with the flange and flange the track out?

A. Yes, sir.

Q. And in all these towns except Cloverton you watched and observed the flanging being done didn't you, saw it done?

A. I saw it in the operation of my other duties, standing on the platform.

Q. And so the only place you did not observe the flanging being done was where this man was hurt?

A. I would have if it had been done.

Q. I say that is the only place you didn't see it done?

A. They didn't do it.

[fol. 188] Q. But you didn't see them start to do it or any part of what they did, did you?

A. They hadn't started.

Q. But you were there and you knew what the movement was?

A. Yes, sir, but they did not make it.

Q. I see. That is so. All right. Now, Mr. Rennie, you called on Mr. Moquin at the hospital, did you not?

A. Yes, sir.

Q. I will ask you this: Did you not when you called on him at the hospital tell him that the ice on the track was the cause of the de-railment and you had so told the company in investigation?

Mr. Boyle: Just a moment. Objected to as not proper cross examination and hearsay.

The Court: Objection overruled.

(Exception by defendant.)

A. I don't remember.

Q. Will you say you did not?

A. I say I don't remember.

Q. Why, what is the matter with your memory on an important matter like that, Mr. Rennie? Have you a poor memory?

A. I can't answer your question with yes or no.

Q. Well, have you ever noticed anything wrong with your memory?

A. No, sir.

Q. As a conductor you are not in habit of forgetting things, are you.

A. No, sir.

[fol. 189] Q. Well, then you would say your momeory was good, wouldn't you?

A. I can't answer the question by yes or no. If you will let me explain——

Q. Yes, I will let you explain.

A. All right. You are trying to have me tell you something that happened a year and a half ago.

Q. Yes.

A. And I can't remember the details of everything that happened a year and a half ago.

Q. But you remember that you have been testifying to pretty near everything that happened a year and a half ago, don't you?

A. I can't remember little conversations of everything——

Q. Oh, you can't remember little conversations?

A. Not insignificant things.

Q. Then how do you remember that Mr. Moquin said that he was afraid when he went back on the track and cannot remember telling that man that you told the company that ice de-railed the car? How can you do that. Tell the jury how you can forget one and remember the other so easy?

A. It all came in with the work.

Q. Well, both of them came in with the work, didn't they?

A. Not visiting at the hospital.

Q. But as to the accident it came in with the work, didn't it?

A. Yes, sir.

Q. And you won't say now that you did not tell Mr. Moquin there in the hospital that you had made a statement [fol. 190] to the company that ice on the track de-railed that car, will you?

A. No, sir.

Q. You were called under investigation, were you not?

A. Yes, sir.

Q. Do you remember what you said at that investigation?

A. Yes, sir.

Q. Did you not state at that investigation that ice de-railed that car?

Mr Boyle: Just a minute.

A. No, sir.

Q. You remember that now?

A. Yes, sir.

Q. You are sure of that?

A. Yes, sir.

Q. Did you sign that investigation, Mr. Rennie?

A. I did.

Q. And will you state now under oath that you did not state that ice caused the de-railment of that car, yes or no?

A. It was——

Q. What is your answer?

A. I didn't make a positive statement ice caused it.

Q. Well, did you mention that ice caused it?

A. I said it was possible.

Q. Oh, you said it was possible that ice caused the de-railment; now why did you say that, tell the jury?

A. Because I said also it was possible that there was [fol. 191] bark there and sticks, stones or anything else. It was a loading dock where they had been loading with a jammer and there might have been any of those things under the snow.

Q. Did you tell them that ice might have caused it, as you have just told the jury?

A. I don't recall whether I did or not.

Q. You just said ice, didn't you?

A. I said it was possible.

Q. Possible. All right. Possible. How did you happen to mention the ice? How did you happen to mention ice? What got ice into your mind, Mr. Rennie?

A. I don't know.

Q. Well, isn't it a fact that you went over there and saw ice on the track or did you have time to observe it?

A. What do you mean by ice?

Q. I mean ice.

A. Do you mean water that is two or three inches deep that froze and made ice?

Q. Well, what do you mean by ice?

A. There is different kinds of ice.

Q. Yes. Well, I am speaking of ice that freezes up here in Minnesota.

A. There is a pail of water that will form ice. There is soft snow that melts a little bit and makes a slush. That isn't ice.

Q. No, you don't consider that ice.

A. That is what I asked you.

Q. All right. Now, then, you did tell the company that [fol. 192] ice possibly derailed this car, didn't you?

A. I said possibly.

Q. Yes. Now, then, seeing that ice doesn't mean melted snow, why did you use the word ice in that investigation and say that ice possibly derailed the car?

A. I said a number of things.

Q. No, but I am asking you, why did you say to the company that ice possibly derailed that car? It was because you saw ice there, wasn't it?

A. I didn't see it.

Q. Well, tell the jury why you would tell the company after this investigation, before this lawsuit, that ice possibly derailed that car if you had not seen any ice? Why did you do that, Mr. Rennie?

A. You have got to give a reason why a car is derailed.

Q. Well, what is it?

A. Several of them are possible.

Q. Now, then, you made a form 71, did you not?

A. Yes, sir.

Q. Did you not state there that snow and ice derailed that car? Yes or no.

A. I don't remember.

Q. Will you say you did not?

A. I don't remember. That form 71 was made out before I inspected it.

Q. Inspected what?

A. The car where it was derailed.

Q. When did you inspect it?

[fol. 193] A. I never inspected it till the next day when I rerailed the car and then men had been working around there for twenty-four hours.

Q. Well, then, you never did inspect it?

A. No, sir.

Q. As I understand you, one of your duties where an accident has occurred is to find out what the cause of that accident was; that is a rule of the company and one of the important rules of the company, isn't it? Isn't that true, Mr. Rennie?

A. There is other rules that——

Q. I didn't ask you that. I said that is one of the important rules of the company?

A. Yes, sir.

Q. And invariably you are charged, under the book of rules and under your habits and custom, when there is an accident on that railroad, with finding out the cause immediately after rendering aid to the injured persons?

A. I had no opportunity immediately after rendering aid.

Q. You left this man at the depot, didn't you?

A. I had not rendered aid yet.

Q. Well, no, there was nothing to do; that is why you left the depot, isn't it, there was nothing you could do, that is why you went over to where the accident happened, isn't it, Mr. Rennie?

A. For one minute.

Q. Well, I say that is why you went over to where the accident happened, because there was nothing you could do to help Mr. Moquin there, was there? That is why you left him, isn't it?

[fol. 194] A. For a minute.

Q. Yes, and there were other men you left there with him, weren't there?

A. Yes, sir.

Q. There was nothing that any of you men could do except to lay him out there and make him as comfortable as possible, that is all you could do, isn't it?

A. I shouldn't have went over there.

Q. Shouldn't have gone over there. Well, you left other men and there was nothing you could do outside of laying this helpless man out and let him be as comfortable as possible, was there? Nothing else you could do for him?

A. Certainly.

Q. What?

A. I could have got the engine that much quicker on the train and loaded him on the caboose and got him to Markville.

Q. Oh, I see.

A. That is what I was figuring on.

Q. Oh, I see. Why didn't you do that?

A. I waited that minute for the dispatcher's O. K.

Q. That is the reason you didn't go, because you were waiting for the dispatcher to give you orders?

A. It was only a moment.

Q. Well, I say——

A. Yes.

Q. You wired the dispatcher, didn't you?

A. Yes, sir.

[fol. 195] Q. And you would await instructions from the dispatcher before you would go ahead, wouldn't you?

A. Yes, sir.

Q. Now, then, while you were waiting for the dispatcher there was nothing you could do to alleviate Mr. Moquin's condition except to lay him on the cot or on the seat there and let him rest, was there?

A. Yes, sir.

Q. There was nothing else you could do, was there?

A. Yes, sir.

Q. What was your answer, there was nothing else you could do?

A. No.

Q. Now, there being nothing else you could do you went over to where the accident happened?

A. Yes, sir.

Q. And you want this jury to understand that, knowing there was nothing you could do to help Mr. Moquin, you went over to where the accident happened and that you, as conductor, did not make any effort to find out what derailed that car, do you?

A. No, sir.

Q. Made no inspection of the track to see whether there was ice over it or not?

A. No, sir.

Q. Made no inspection as to where the car went off the rails, did you?

A. No, sir.

[fol. 196] Q. Did you not look to see the place where the car went of the rails?

A. No, sir.

Q. Didn't make any effort to find out what derailed that car?

A. No, sir, that requires time.

Q. How much time would it require to look at where the car had cut either through the snow or ice and gotten off the track, how much time?

A. Considerable time.

Q. How much? Half an hour?

A. Yes, sir, it would take fifteen or twenty minutes to half an hour to look over and determine. You can't determine in a ball of snow what happens.

Q. No. How much time would it have taken you to have looked where the car went off the track and see whether there is ice over the rails or not, how long a time, a half an hour?

A. That was covered by another car.

Q. It wasn't all covered. You could have gotten down there. How long would it have taken you to just look where the car went off the track and see whether there was ice on that track or not, how long would it take you, Mr. Rennie? Wouldn't take as long as you are hesitating?

A. I am not hesitating, only——

Mr. Boyle: I submit it is repetition.

(No ruling.)

Mr. Davis:

Q. How long would it have taken you to have looked and seen whether there was ice on those tracks when you [fol. 197] were right there? How long would it have taken you?

A. It would take ten or fifteen minutes to walk around the car and then you wouldn't know anything about it.

Q. Ten to fifteen minutes to walk around the car?

A. Give it a proper inspection.

Q. How fast would you walk?

A. You are saying that ice put it off. You have got to look and see whether the wheels are all right, broken bolts, spread trucks—a thousand things and I am not going to look at a thousand things——

Q. And you didn't look at anything to find out?

A. No, I was taking a man to first aid.

Q. Oh, yes, so when you went over there all you went over for was to see where he landed on the ground, that is right, isn't it?

A. I went over to see where he had fallen.

Q. Yes. Did you find the place?

A. I don't know.

Q. Then, you don't know where he fell?

A. I am not positive.

Q. Yes.

A. Because there was nobody there with me.

Q. Will you now state under oath that you did not in your form, your first report, state to the company that ice derailed this car? Yes or no.

Mr. Boyle: This is objected to as repetition.

Mr. Davis: Well, I think it is, but it is cross examination.

[fol. 198] The Court: I am not sure the witness answered that question directly.

Mr. Davis: No, I think not.

The Court: Will you answer that question?

(Exception by the defendant.)

Mr. Davis:

Q. Will you now state under oath that you did not make a report to the company that ice derailed this car?

A. No, sir.

Q. You don't know whether you did or not?

A. No, sir.

John F. Roe, called on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Where do you live, Mr. Roe?

A. Minneapolis.

Q. What is your business or occupation?

A. Engineer.

Q. Were you the engineer on the train which went through Cloverton on which Mr. Moquin was injured?

A. Yes, sir.

Q. How long had you been traveling on that run?

A. About ten years.

Q. You remember the train pulling into Cloverton, do you?

A. Yes, sir.

[fol. 199] Q. What do you remember about where the train pulled to as it went into the station at Cloverton, where did you first stop?

A. We stopped at the depot. Then pulled over the crossing down to clear the main line or the passing track west switch and——

Q. Do you have any recollection now as to the length of time that you stopped at the depot?

A. A very short time. I don't remember just how long.

Q. Do you have any recollection as to whether or not any work was done there, like unloading freight?

A. No, I wouldn't know. I was on the opposite side.

Q. That is, the engineer's side of that engine was across from the depot?

A. Yes, sir.

Q. After you pulled into Cloverton and stopped, what was the next thing that you did?

A. Pulled ahead, down to the west switch.

Q. Did you pull ahead on some signal that you received?

A. Yes, sir, the fireman told me he got a sign to pull ahead down to the clear.

Q. But the signal to pull ahead and clear the crossing was on the opposite side of the train from you?

A. Yes, sir.

Q. So that the signal would be relayed to you through the fireman?

A. Yes, sir.

[fol. 200] Q. Then you pulled up to clear the crossing there, did you?

A. Pulled up to clear the west switch, yes. That would bring the caboose over the crossing, the Main street crossing.

Q. What did you do when you got up to that point?

A. The head brakeman cut off the engine and we came in on the house track.

Q. Did you run the engine on some signal that you received?

A. Yes, sir.

Q. From whom did you receive that signal?

A. Mr. Carr.

Q. That was the head brakeman, was it?

A. Yes, sir.

Q. And then you backed into the house track upon signal from Mr. Carr?

A. Yes, sir.

Q. And what did you do then?

A. Coupled on to cars and got another sign to back up.

Q. Where were the cars that you coupled on to?

A. I should judge about a car and a half west of the crossing, Main street crossing.

Q. Then as you backed up from the west switch, you first backed over the house track to the cars that were just west of the Main street crossing?

A. Yes, sir.

Q. When you refer to the Main street crossing, you mean the crossing at Cloverton?

A. Highway crossing, yes, sir.

[fol. 201] Q. The highway crossing that goes over the track there; that is a grade crossing?

A. Yes, sir.

Q. Did you run through any snow with your engine as you backed from the switch up to where the cars were?

A. Very little. I don't remember that there was any. I think we could see the rails all the way.

Q. Did you notice as you pulled into Cloverton what was the condition of the passing track?

A. Yes, sir.

Q. What was the condition of the passing track with reference to snow?

A. Very little snow. We didn't figure it needed flanging at all.

Q. There were no cars stationed on the passing track, I understand?

A. No, sir.

Q. You backed up to the boxcars that were just west of the crossing. As I understand it, there was first an empty and then a load of ties, is that right?

A. Yes, sir.

Q. What did you do when you got back to those cars?

A. Coupled on to them and shoved back; got a sign to back up and we shoved back to them.

Q. From whom did you get that sign to back up?

A. Mr. Carr.

Q. Where was Mr. Carr at that time?

A. On the foot board behind the tank.

[fol. 202] Q. When you got the sign from Mr. Carr, did you back your engine?

A. Yes, sir.

Q. How far did you go with your engine in a backward direction?

A. Till the cars went off.

Q. What did you do when the car went off the track?

A. Set the brake, automatic brake, the quickest way to stop.

Q. You stopped just as quickly as you could?

A. Yes, sir.

Q. Would you be able to estimate about how far you traveled after the car was derailed, how far along that went?

A. I should judge about 150 feet or so; four or five car lengths. I don't know just exactly how far.

Q. How fast were you traveling as you backed those cars along the house track?

A. Between eight and ten miles an hour, I should judge.

Q. Was there any snow between the place where the cars were stationed west of the crossing and the crossing itself?

A. I couldn't tell as to that, behind the cars.

Q. What is your recollection as to the condition of the tracks just east of the crossing?

A. Well, there was a little snow and then beside the warehouse there, the snow was blown off the track, then there was snow again.

[fol. 203] Q. You could see that snow as you backed up there?

A. Yes, sir, I saw it coming into town.

Q. About how far do you think it was from the crossing back to where the car was derailed, or don't you have any very good estimate of that?

A. I couldn't just exactly say.

Q. When you hooked on to these cars just west of the crossing after you got the signal from Mr. Carr, did you see Mr. Carr again after that?

A. Yes, sir.

Q. Where did you see him?

A. He went up on top of the boxcars and walked back to the second car. I could see him all the time.

Q. As you backed into the house track and came back to where the cars were stationed, did you see Mr. Moquin?

A. No, I couldn't see Mr. Moquin.

Q. Did you see Mr. Moquin at any time before the accident?

A. No, I did not.

Q. So that if Mr. Moquin was up on top of the boxcar, which he apparently was—what I am trying to find out is whether or not he was in such a position that you could see him?

A. No, I didn't see him. I didn't notice him at all on top of the car.

Q. How did you find out that some accident had taken place there?

A. I saw the car go off. I was watching back.

Q. And what did you do then?

[fol. 204] A. I stopped the engine. I stopped the train, or the cars.

Q. And after you got the engine stopped what did you do?

A. Well, the fireman come over to my side to see what happened and he says, "Where is Moquin?" and I says, "I don't know." He ran back on the other side and jumped down and ran back to see and I went over to look out the window and he says, "Moquin is hurt." So I went back there myself then.

Q. Where was Mr. Moquin when you got back to the place of the derailment?

A. He was lying on the ground.

Q. What did you do then?

A. Well, we tried to pick him up. We got several holds before he would allow us to carry him that way, the fireman and I, and we carried him over to the depot.

Q. You and the fireman did that?

A. Yes, sir.

Q. Did you make any inspection of the premises there to determine the cause of the derailment?

A. No, I did not. I didn't leave Mr. Moquin at all.

Q. Did you stay with Mr. Moquin all the time then until he was put on to the caboose and you pulled out of town?

A. Yes, sir.

Q. Did you go back to the scene of the accident at all?

A. No, I didn't go back at all.

[fol. 205] Cross-examination.

By Mr. Davis:

Q. When you arrived there where Mr. Moquin was, is is not a fact that you asked him how he got hurt?

A. Well, I don't remember. I could tell that, that he got throwed off the top of the boxcar.

Q. Is it not a fact that he told you the ice derailed that car?

A. No, I don't remember that he told me the ice derailed the car at all.

Q. You don't remember whether he did or not?

A. No, sir.

Q. You made no effort to find out what caused the car to be derailed, as I understand it?

A. No, sir.

Q. You made no inspection of the condition of the rails there where the car was derailed?

A. Just looked over there from Mr. Moquin and I couldn't see nothing but snow there.

Q. Did you appear at an investigation of this case?

A. Yes, sir.

Q. Did you not state in that investigation in writing that ice and snow caused this car to be derailed?

A. Snow. I didn't see nothing but snow.

Q. Did you say ice in that statement?

A. No, sir.

Q. You are sure of that now?

A. Yes, sir.

[fol. 206] Q. You did not make any particular investigation of the track?

A. No, sir.

Q. Did you see particularly where the car had left the track?

A. The next day.

Q. But I mean that day.

A. No, sir.

Q. So that day you didn't pay any attention to the condition of the track where the car had been derailed, you were attending to Mr. Moquin?

A. Yes, sir.

Q. It was the next day that you saw the condition of the track, when you were re-railing the car?

A. Yes, sir.

Q. Re-railing, I guess they call it, don't they?

A. Re-railing the car, yes.

Q. That is practically all you know about this accident?

A. Yes, sir, I was running the engine and—

Q. Yes. I presume it is, of course, your duty as an engineer, as well as the conductor's duty, when an accident occurs, one of your very important duties to ascertain the cause of the accident, isn't it?

A. If we are close enough, if we can get there.

Q. If you are close enough and can get there, and that is, of course, in the campaigns of the railroad for safety first, they want to know the causes of accidents so as to do away with them and avoid injuring men in their employ, that is true, isn't it, they are very anxous, of course, to find out [fol. 207] the causes so as to eliminate accidents?

A. Yes, sir.

Q. In other words, if a bad flange or something had been on that wheel, if they found that out, they would want to know it in order to avoid such a contingency again?

A. Yes, sir.

Q. They lay the duty, under the rules, upon not only the conductor, but the engineer and every employe, that when an accident occurs one of their very important duties is to ascertain right away what has caused that accident, isn't that true?

A. Yes, sir.

Q. You made no effort that day to find out the cause of this derailment?

A. No, sir.

Q. Did I understand you to say that Mr. Carr was on the second car? You mean the empty or the car of ties?

A. The car of ties. He walked back over the empty to the car of ties.

Q. By the second car, you mean the car of ties?

A. Yes, sir.

Q. That would be the second car farthest from your engine?

A. Yes, sir.

Q. In what position was he on that car of ties, the middle or towards the east end of the car?

A. Well, I could see him, just see him from about here (indicating) because the tank is high. I could see him from along about here. I should judge he was near the center of the car.

[fol. 208] Q. And you saw him walk from the empty car over to the car of ties?

A. Going back, yes, sir.

Q. And you would judge that he was about the middle of the car?

A. I would think he was.

F. L. Cornealus, called on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Where do you live?

A. Superior.

Q. And what is your business or occupation?

A. I am a fireman.

Q. For the Soo Line?

A. Yes, sir.

Q. Were you the fireman on the train on which Mr. Moquin was injured?

A. Yes, sir.

Q. You remember that train pulling into Cloverton on the day of the accident?

A. Yes, sir.

Q. What do you remember about the stop at the station?

A. Well, it was brief.

Q. You were on the depot side, as I understand it?

A. Yes, sir.

Q. After a brief stop there, did you get any signal to pull ahead?

[fol. 209] A. I did.

Q. From whom did you get that signal?

A. I couldn't say.

Q. Was it from the rear of the train?

A. Yes, sir.

Q. You relayed that to the engineer and the train went forward?

A. I did.

Q. And cleared the Main street crossing there in Cloverton?

A. Yes, sir.

Q. So that the caboose would clear the crossing?

A. Yes, sir.

Q. And then the engine was cut off?

A. It was.

Q. Do you remember whether you got the signal to cut off the engine or whether the engineer did?

A. No, it was cut off on the other side.

Q. The work was done on the other side?

A. Yes, sir.

Q. What did you do after the engine was cut off?

A. Well, I was having some trouble with the coal in the bottom of the coal gates, some chunks that had got lodged in the bottom of the coal gates and I was trying to get those chunks loose, broken up. They were stuck in there.

Q. You mean chunks of coal?

A. Yes, large chunks. It had been bothering me quite a little while and I was pretty busy with those coming into Cloverton.

[fol. 210] Q. You were having some trouble with your fire on account of those big chunks of coal?

A. No, it wasn't with the fire. I had fire all right, but the coal got lodged on the gates and it was much easier to get it out while you were working slow than after you started out.

Q. You were having trouble getting those bigger chunks out of the tender, then?

A. Yes, sir, that is the idea.

Q. You remember that your engine backed into the house track, do you?

A. I do.

Q. The signal for that, the work in that regard was done on the other side of the train, you didn't have anything to do with those signals?

A. No, sir.

Q. Then you started backing up from the switch at the west end back to where the cars were stationed?

A. Yes, sir.

Q. What do you remember now about whether those cars were coupled together, or apart?

A. They were, yes.

Q. They were coupled together?

A. Yes.

Q. What is your recollection about where they were stationed with reference to the crossing?

A. Well, possibly a couple cars or so, not very far from the crossing.

Q. As you backed from the west end switch up to those cars, did you encounter any snow, was there any snow along that portion of the track?

[fol. 211] A. Well, I didn't look back there myself at all until we got nearly back to the cars and I jumped up on my seat for a second, so as far as the snow is concerned, I didn't notice it backing in at all. I wasn't looking for it. I was busy with those lumps of coal in the bottom of the grate.

Q. So you then were not on the fireman's seat or looking out of the engine as you were backing up there?

A. Not until we got nearly to the cars. When we got very close to the cars I bobbed up there on the seat for a minute and took a look back.

Q. Did you sit on the seat then until the engine was coupled to the cars?

A. I did.

Q. And what did you do then?

A. Well, I stayed there until after I saw the cars were over the crossing.

Q. And then what did you do?

A. Then I got down and I started working on that coal again.

Q. When you were up on your seat there and looking out of the engine, did you see Mr. Moquin?

A. Before we coupled on to the cars I saw Mr. Moquin on top of the cars. Just before we coupled on to the cars.

Q. Where was Mr. Moquin at that time?

A. Well, he appeared to be standing near the end of the car.

Q. And did you see what he did then?

A. No, I did not. You see, those bunkers are pretty high and I couldn't see him after we coupled on, but when [fol. 212] we was a little further away I could see him.

Q. You say he was standing near the end of the car, was he on the ground or on top of the car?

A. He was on top of the car.

Q. On top of the car then?

A. Yes, sir.

Q. That was before you coupled on to the car?

A. Yes, sir.

Q. You backed the train over that crossing and after you had got over the crossing, what did you do?

A. I got down and started working on that coal again.

Q. Did you stay at that work until the time of the accident?

A. Yes, until I heard Mr. Roe throw air in the emergency and I jumped over to see what the trouble was and I see the car sticking out there on his side and then I hollered to him, "Where is 'Moke'?" and I went out the gang-way on the other side. Then I found him out there.

Q. You went out the gang-way, that would be on your own side?

A. Yes, I went back and went out my own side because the cars were sticking out on Mr. Roe's side.

Q. You went over to Mr. Roe's side and looked back and saw that a car had been derailed?

A. Yes.

Q. Then went out the gang-way on your own side of the engine?

[fol. 213] A. Yes, sir.

Q. Did you go back to where Mr. Moquin was lying?

A. Yes.

Q. What did you do then?

A. Well, we tried—Mr. Carr was there, I think. I would not be positive about that, whether Mr. Carr was there

when I got there or whether he wasn't, but I think he was, and of course, we tried to talk with him and he seemed to be dazed a little bit at the time and he was groaning and I asked him how he was hurt, tried to get out of him as much as we could, how he was hurt and I tried to move him around a little bit with his leg. He said his legs hurt him and his back.

Q. Go ahead and tell us what you did.

A. Well, in the meantime I hollered to Mr. Roe. He come over on my side and I saw him up there looking out the window and I hollered to him and told him "Moke" was hurt, so he came back there and then we tried to get a hold of him and every time we tried to take a hold of him it would hurt him, so we would have to kind of let loose of him and try to get a new hold so it wouldn't hurt him so much to carry him over to the depot and Mr. Carr, I think, and Mr. Roe carried him over there.

Q. Your recollection is that Mr. Carr helped you do that?

A. I think so.

Q. Did you at that time pay any attention to the place of the accident?

[fol. 214] A. No.

Q. You were devoting your attention to Mr. Moquin?

A. Yes, sir.

Q. After you got over to the depot, what did you do?

A. Well, I stayed there with him a few minutes trying to unloosen his clothes and get his socks down, his rubbers unbuckled, and we couldn't do very much because his legs pained him so. We were trying to get him in as comfortable a position as we could. We got some cushions there and put him on those and tried to make him as comfortable as we could. Then, I had to go back to the engine.

Q. Did you stay at the engine, then, until you pulled out of Cloverton?

A. Yes, sir.

Q. You did not go back to the scene of the accident at all?

A. No, I didn't go back at all.

Cross-examination.

By Mr. Davis:

Q. How long were you at the place of the accident?

A. Well, sir, I couldn't say.

Q. Several minutes, I presume, till the men came back, the engineer, and helped pick him up, and of course, it was rather difficult to pick Mr. Moquin up?

A. Yes.

[fol. 215] Q. He was suffering, as you could notice, extreme pain?

A. Yes.

Q. Did he tell you where that pain was?

A. In his legs and back.

Q. And you made no inspection of the cause of the derailment whatsoever?

A. Not at all.

Q. Don't know the condition of the track there at that time?

A. No.

Q. And don't know whether there was ice or what was there?

A. No, I don't.

Q. Is it not one of your duties, as well as every railroad man, when an accident occurs, is it not one of the duties set out in the book of rules that you should, as quickly as possible, ascertain the cause of the accident?

A. No, sir.

Q. You say that is no part of your duty, is that true?

The Court: The witness has already answered. He said no, as I understood him.

Mr. Davis: Oh, I withdraw the question. He has answered.

Daniel G. Carr, called on behalf of defendant, duly sworn, testified as follows:

[fol. 216] Direct examination.

By Mr. Boyle:

Q. Where do you live?

A. Superior, Wisconsin.

Q. What is your occupation?

A. Brakeman.

Q. And how long have you been working as a brakeman?

A. Since 1912.

Q. For the Soo Line?

A. Yes, sir.

Q. Have you also been promoted to the position of conductor?

A. Yes, sir.

Q. When were you so promoted?

A. 1923.

Q. You have worked as a conductor part of the time since 1923?

A. Oh, make a trip once in a while.

Q. When the business didn't keep you busy as a conductor you went back and worked as a brakeman, is that right?

A. Yes, sir.

Q. Were you a member of the train crew on the train on which Mr. Moquin was injured?

A. Yes, sir.

Q. You remember of that train pulling into Cloverton?

A. Yes, sir.

Q. Where were you riding when the train pulled into Cloverton?

A. On the engine?

[fol. 217] Q. How long had you been riding on the engine?

A. I rode on there all morning.

Q. You had been riding on the engine throughout the entire trip, had you?

A. I went over to the engine at Black River and I stayed there the rest of the morning.

Q. You think that you rode in the caboose until you got to Black River?

A. I think from Boylston Junction to Black River I did, yes.

Q. Were you in the caboose at Boylston Junction?

A. I believe I was, yes.

Q. Did you have some conversation with Mr. Rennie at that place?

A. Yes, Rennie told me the effect of the message that he got. He might have let me read it. I don't remember now.

Q. What is your recollection about that conversation?

A. Well, my recollection is that he said, "We are to do a good job of flanging, we had orders to do a good job of flanging, flange the tracks."

Q. And then, leaving that point, did you start to flange out as you went from station to station?

A. Yes, sir.

Q. Did you get any further instructions from Mr. Rennie in connection with that flanging out work or did you go ahead with it without such instructions?

A. Went ahead without instructions.

Q. When you pulled into Cloverton, did the train stop [fol. 218] at the depot?

A. I believe it did for a moment or two.

Q. You remember that there was a short stop, do you?

A. Yes.

Q. Do you have any recollection as to whether there was some work done at the station, such as unloading freight or anything of that kind?

A. I couldn't say. I didn't look back.

Q. After you pulled up to the station and stopped, did you get a signal to go ahead or what do you remember about that?

A. I believe the fireman got the signal.

Q. You didn't take part in that signal?

A. No.

Q. You didn't get it from the rear or anything?

A. No, I didn't. I didn't look back.

Q. Did you cut off the engine after you went up and cleared the crossing?

A. Yes, sir.

Q. When you cut off that engine, what was the next thing that you did?

A. When the engine pulled over the switches I threw the switches to back in the house track.

Q. And then what did you do?

A. Got on the foot board.

Q. What was the condition of the track from those switches back to the place where the boxcars were located?

A. The condition was good, very little snow.

Q. Very little snow along that part of the track?

[fol. 219] A. Yes, sir.

Q. What was the condition of the passing track at Cloverton on that day?

A. That was good, very little snow on it.

Q. After the engine backed into the house track, you got on to the engine again?

A. Yes, sir.

Q. Where were you on the engine?

A. On the footboard. On the rear of the tank.

Q. Did the engine back up until you came to the box-cars?

A. Yes, sir.

Q. And what is the fact with reference to those cars, were they coupled together or were they wide apart?

A. They were coupled together.

Q. Then, when you got back to the cars, the engine coupled on to those cars?

A. Yes, sir.

Q. Did you make that coupling?

A. Yes, sir.

Q. And what did you do then?

A. I went up the ladder on top of the car.

Q. Did you give any signal to the engineer after you coupled on to the car?

A. Yes, I gave the signal to back up.

Q. Was that before you got on top of the cars or afterwards?

A. That was before, as soon as I made the coupling.

Q. And then what position did you take when you got on top of the car?

[fol. 220] A. I walked back about the center of the second car.

Q. Were you in a position on the car, then, so that you could see the engineer?

A. Yes, he could see me.

Q. You were in a position where you could signal to him, were you?

A. Yes, sir.

Q. Did you see Mr. Moquin after you got up there on the car?

A. Yes, sir.

Q. And what conversation, if any, did you have with Mr. Moquin after you got on top of that car?

A. I asked him if Renhie wanted to flange the passing track and he said no, and he remarked that we would have to take it kind of easy through here.

Q. Was that all of the conversation that you had with Mr. Moquin at that time?

A. Yes, sir.

Q. Did you say anything to Mr. Moquin when he said to you, "We will have to take it easy through here"? Did you say anything in answer to that, or did you have any further conversation about that?

A. No, the car left the track right after that.

Q. And then, when the car left the track, what did you do and what happened to Mr. Moquin?

A. When I felt that the car was off the track I turned toward the engine, going to give the stop sign, and the car gave a lurch and I grabbed the running board and hung on.

[fol. 221] Q. You hung on to the top of the car, did you?

A. Yes, sir.

Q. Did you see Mr. Moquin pitched from the top of the car?

A. No, I didn't see him any more.

Q. When you next saw Mr. Moquin he had already fallen to the ground?

A. Yes, sir.

Q. When the car came to a stop, you were still hanging on to the top?

A. Yes, sir.

Q. What did you do then?

A. I looked around to see where Moquin was and he wasn't in sight, so I looked over the edge of the car and he was laying on the ground.

Q. And what did you do then?

A. Then I climbed down and went to him, asked him if he was hurt or hurt bad. He complained of his legs. He said, "Oh, my legs."

Q. Then what?

A. Then the fireman and engineer came back and we picked Moquin up and carried him to the depot.

Q. That clears up one point. Did you help carry Mr. Moquin to the depot?

A. I believe I did.

Q. Your recollection is that you and the fireman and the engineer carried him over to the depot?

A. Yes.

Q. Is that right?

A. That is my recollection of it, yes.

Q. What did you do after you got over to the depot, [fol. 222] what was the next thing that happened?

A. Well, I ran down to the caboose then to tell the conductor.

Q. And then what did you do?

A. Went in the caboose and he was sitting at the table writing and I told him Moquin was hurt.

Q. You had had no conversation with Mr. Rennie, the conductor, from the time you pulled into Cloverton?

A. No.

Q. Had you had any conversation with the conductor from the time you left Black River, where you said you went over from the caboose to the engine?

A. None at all that I remember.

Q. You were riding the front all the time and were not with the conductor afterwards?

A. Yes, sir.

Q. After you told the conductor that Mr. Moquin had been injured, what did you do next?

A. I went back with him to the depot.

Q. Went back with the conductor?

A. Yes,

Q. Then what did you do?

A. I stayed right there until we took the engine back to the train.

Q. Did you take the engine back to the train?

A. I believe I did.

Q. Went with the engine, did you?

A. Yes.

Q. Then, did you stay on the engine or did you come back to the caboose?

[fol. 223] A. I dropped back to the caboose again, rode to Markville in the caboose.

Q. After you coupled up the engine?

A. Yes.

Q. Did the train start out then to go back over the crossing or did you walk back before the train started?

A. Well, we backed the train up some few car lengths to the depot again to load Mr. Moquin on.

Q. And did you help load him on?

A. No, I don't believe I did.

Q. You think that the other men who remained back there when you went up with the engine probably did that?

A. Yes.

Q. But then, either at the time the train left Cloverton and started out for Markville or shortly after that, you did get back to the caboose again?

A. Yes.

Q. And rode in the caboose on over to Markville, I suppose?

A. Yes.

Q. Did you make any inspection there at the place of the derailment at all, at that time?

A. No, I did not.

Q. Either before you carried Mr. Moquin over to the depot or after you went back for the engine?

A. No.

Cross-examination.

By Mr. Davis:

Q. I understand the last two questions to be that you [fol. 224] made no inspection of the tracks?

A. No, I did not.

Q. And how long were you there where Mr. Moquin was lying on the ground?

A. Just a few minutes.

Q. Well, five or ten minutes?

A. Not over five minutes, I don't think.

Q. So you made no inspection of the condition of the tracks where the car was derailed?

A. No, I did not.

Q. Do you recollect being a witness in the investigation?

A. Yes.

Q. Did you state then the cause of the derailment?

A. No, I stated that I did not know.

Q. Did you state anything to the railroad company about ice being on the tracks, on the rail?

A. No, I stated there was no ice that I saw, packed ice, on the flange around the rail.

Q. Did you not talk to Mr. Moquin, the plaintiff here, at the hospital and tell him that there was ice over the rails and that is what caused the derailment? Yes or no.

Mr. Boyle: Objected to as not proper cross examination.
The Court: Objection overruled.
(Exception by the defendant.)

Q. Isn't that a fact, Mr. Carr?
A. No, it is not.
Q. Did you talk to him in the hospital?
A. Yes, I went to see him.
[fol. 225] Q. Did you talk to him about the cause of this derailment?
A. I might have.
Q. Will you now state that you did not tell Noah Moquin there that you had stated to the company in the investigation that there was ice on the rail that caused the derailment, ice and snow, isn't that a fact, Mr. Carr?
A. No, it is not.
Q. Did you talk to him about what caused the derailment?
A. I may have.
Q. You don't remember whether you did or not?
A. I don't know whether I did or not.
Q. Mr. Rennie showed you this order, did he, at Boylston Junction?
A. Yes, I believe he did.
Q. You read it?
A. Yes, sir.
Q. And understood it, I presume, did you not?
A. Yes.
Q. Now, when it says, "Do a good job of flanging. Advise what tracks you flange out," who determines what track will be flanged, the brakeman or the conductor?
A. Why, we flange all the tracks.
Q. I didn't ask you that. This is addressed to the conductor of 51, isn't it?
A. Yes.
Q. That is an order to him. That order doesn't say to flange all the tracks, does it?
A. No.
[fol. 226] Q. No. Now, then, who told you to flange all the tracks? That order didn't and you have told the jury all the conversation you had with Mr. Rennie and you didn't tell the jury of anything said to flange all the tracks, but that he showed you this order and said to do a good job of flanging. That is all that Rennie told you, isn't it?

A. That is what the order means, to flange all tracks that need it.

Q. Well, who determines, then, what tracks need flanging? Does the conductor? He is in charge of the train, isn't he?

A. Yes.

Q. The conductor is the man to determine, then, what tracks should be flanged and what tracks need to be flanged and what do not need to be flanged, that is true, isn't it, and he is boss?

A. Yes.

Q. You boys take your orders from him, do you not?

A. Yes.

Q. Now, frequently when trains are late, you as a brakeman, in your many years of experience, have frequently gone to the conductor and asked him what particular work he wanted you to do, haven't you? That is a common practice, isn't it?

A. Well, he would tell us if he wanted to cut out any work without asking.

Q. He would tell you without asking?

A. Yes.

Q. I understood you to say that you were on top of the car with Mr. Moquin, were you?

[fol. 227] A. Yes.

Q. And you said that you spoke to Mr. Moquin and asked him if Rennie wanted to flange the passing track, you asked Mr. Moquin that, didn't you?

A. Yes.

Q. Why did you ask him that question, if he left it to you to flange the tracks, why did you ask Moquin if Rennie wanted you to flange the tracks?

A. I didn't think the passing track needed flanging, but I wouldn't go away and leave it without some authority.

Q. That is, that Rennie is the boss and he is the one that decides what tracks are to be flanged, isn't he, that is the reason you asked that question, isn't it, that you are getting your orders from Rennie?

A. Yes.

Q. Now, what did Mr. Moquin say when you asked him that?

A. He said no.

Q. He said no, that Rennie said he didn't need to flange the passing track, that is true, isn't it?

A. All he answered was no.

Q. Now, the reason you asked Mr. Moquin on top of that car—I will put it in your own words again, Mr. Carr, "I asked him if Rennie wanted to flange the passing track"; the reason you asked him that was that you were late and you took your orders from the conductor, isn't that true?

A. The reason I asked him was because I didn't think it needed flanging.

Q. Well, then, why did you ask him if Rennie wanted it [fol. 228] flanged? Didn't you decide that for yourself? Why did you ask him if Rennie wanted it flanged?

A. He is the conductor.

Q. Why, yes, and the reason was that you were getting your orders at every station from that conductor, what to do and what tracks to flange, weren't you? Isn't that true Mr. Carr?

A. No, I got no orders that morning from him except at Boylston.

Q. Well, why did you ask at this particular time? Why did you ask Mr. Moquin if Rennie wanted you to flange this track? What was the reason you asked him that if Rennie wasn't giving the orders?

A. Rennie had given orders or we had orders in the morning which we figured would include all tracks.

Q. Well, then, was there any reason to inquire about this particular passing track if it included all tracks? What was the reason? I would like to get at what is in your mind as to why you asked Moquin on that car whether Rennie had told him to flange that passing track, if you were going to flange all tracks. What was in your mind when you asked Moquin that question?

Mr. Fryberger: Objected to as repetition.

Mr. Davis: Oh, I don't think so.

The Court: The witness may answer the question.

(Exception by the defendant.)

Q. What was in your mind when you asked Mr. Moquin [fol. 229] if Rennie wanted to flange the passing track? What caused you to ask that question, Mr. Carr?

A. I didn't think the passing track needed flanging.

Q. Is that the reason you asked him if Rennie wanted to flange it?

A. He was the boss. If we were going to leave any tracks, why he should know it.

Q. Should know it. Well, then, that would imply that Mr. Moquin must have had a talk with Rennie about what tracks to flange?

Mr. Boyle: That is objected to as argumentative.

The Court: Objection sustained.

(Exception by plaintiff.)

Q. The only reason you can give for asking Mr. Moquin when you were on top of that car, "Does Rennie want to flange the passing track?" is because he is the boss, isn't it? That is the only reason you can give?

A. Yes.

Redirect examination.

By Mr. Boyle:

Q. Mr. Carr, you said that you got no orders from Mr. Rennie all morning; did you mean after the converastion that you had at Boylston Junction?

A. Yes, the original orders.

Recross-examination.

By Mr. Davis:

[fol. 230] Q. I don't suppose you remember all the conversation you had with Mr. Moquin on top of the car, every word of it, do you a year and a half ago?

A. Well, my mind has been refreshed on that several times.

Q. Who refreshed it?

A. I told it at the investigation a couple days afterwards.

Q. Yes?

A. And I read the papers over last fall and I told it several times to the attorneys.

Q. Well, you say that you read the papers over last fall; what for, for the purpose of refreshing your memory?

A. No, they were sent to me for signature.

Q. Last fall?

A. Yes.

Q. Hadn't you signed any papers before last fall?

A. Not the investigation paper.

Q. You had not signed investigation papers from February, February 27th, until what time in the fall?

A. I couldn't say. I believe it was in October.

Q. You say, then, that you signed no investigation papers from February 27th till October, 1928, is that correct, Mr. Carr?

A. Yes, sir.

Q. Now, then, outside of that, I will ask you whether or not you recollect every word that you said and every word that Mr. Moquin said to you on top of the car, do you remember every word that was said by both of you?

[fol. 231] A. I believe I do.

Q. Remember every word?

A. I couldn't say that every word would be exact, no.

Q. Mr. Carr, you have talked this over, of course, with the attorneys since you have been here?

A. Yes.

Q. They have shown you what you signed, to refresh your memory, haven't they?

A. No.

Q. Haven't you read what you signed since you have been here?

A. No, sir.

Q. Hasn't been shown to you?

A. No, sir.

Q. When was the last time you read it?

A. The only time I read it was last fall.

Q. Well, then, from last fall up to the present time there has been nothing to refresh your mind, has there?

A. No, I don't believe so.

Q. So from October to May there has been nothing occurred to refresh your mind as to what talk you had with Moquin on top of the car? That is true, isn't it?

A. Yes, that is true.

Q. Mr. Carr, you were standing about the middle of the car, were you?

A. Yes.

Q. Mr. Moquin was standing right by you?
A. Yes.
Q. Within a foot or two or three feet?
[fol. 232] A. Yes.

Mr. Fryberger: May it please the court, before adjournment I want to make this suggestion, if it is agreeable to counsel and the court, that they allow us to take these pictures that were introduced in evidence and let our physicians read them.

Mr. Davis: Surely.

Mr. Boyle: I wonder if we may also stipulate regarding these photographs?

Mr. Davis: No, I would like to have the foundation laid on that. There was no agrement as to photographs, as I understand. I want to cross examine. They were taken a long time afterwards. There is no snow on the ground and they don't show the situation at the time of the accident in any way so far as snow and ice is concerned. Your claim agent is here. He can identify them.

Adjourned to 2:00 o'clock P. M. of the same day, Tuesday, May 21, 1929.

Mr. Davis: I desire to change the offer of the rules which I offered yesterday and I now desire to introduce Rule 107 on page 70 of the Book of Rules which the conductor testified were applicable at the time of the injury.

Mr. Boyle: As I have said before, we do not raise any question but what these are the rules of the company and we are stipulating with counsel that they are the rules of the company and we produced them ourselves at counsel's request, but on the question of the materiality or the [fol. 233] relevancy of this rule we do have an objection. We think that it does not apply to this case and that it is not properly receivable in the case as evidence.

The Court: And that objection is made upon what ground?

Mr. Boyle: Upon the ground that the rule is not material or relevant. We make no objection as to the foundation laid, you understand.

The Court: The objection is overruled and the rule will be received and counsel may have the privilege at this time of reading the rule to the jury.

(Exception by defendant.)

(Rule 107 was thereupon received in evidence and read to the jury by Mr. Davis.)

Mr. Davis: There is one other rule I had not taken up and I desire to offer 108 which I think is coupled with 107 and should be introduced as material to the case. I think it bears on 107.

The Court: You are familiar with Rule 108?

Mr. Boyle: I am not, your Honor.

The Court: It seems to be almost a re-statement of the first.

Mr. Boyle: Yes, we take the same position with reference to that rule as we did to the last one, as immaterial and irrelevant. We object to it for the reason that it is immaterial and irrelevant.

The Court: Objection overruled.

(Exception by the defendant.)

(Rule 108 was thereupon received in evidence and read to the jury by Mr. Davis.)

Mr. Davis: We now offer in evidence Rule 1151, the first [fol. 234] paragraph thereof.

The Court: You are familiar with 1151?

Mr. Boyle: Yes, your Honor. That is objected to as immaterial and irrelevant.

The Court: I take it there is no objection to the offer of the first paragraph to the exclusion of what follows that paragraph?

Mr. Boyle: No, the second paragraph is not so connected with the first that it would make any difference.

The Court: The objection is overruled. The first paragraph of Rule 1151 is received and counsel will read it to the jury.

(Exception by defendant.)

(The first paragraph of Rule 1151 was thereupon received in evidence and read to the jury by Mr. Davis.)

Mr. Davis: We now offer in evidence Rule 1152.

The Court: You are familiar with that rule?

Mr. Boyle: Yes, your Honor. It is objected to as immaterial and irrelevant.

The Court: Overruled.

(Exception by defendant.)

(Rule 1152 was thereupon received in evidence and read to the jury by Mr. Davis.)

Mr. Davis: That is all we desire to introduce.

Mr. Boyle: At this time the defendant wishes to offer in evidence Rule No. 102.

Mr. Fryberger: Has the bulletin been identified?

Mr. Boyle: The bulletin has been identified as an exhibit.

Mr. Davis: I would state to your Honor that I do not [fol. 235] believe that is material. It has reference to protecting the crossing, but if counsel is willing to let 102 in with it I have no objection.

Mr. Boyle: It is in the testimony that Rule 102 supersedes the rule counsel calls to your Honor's attention and Rule 102 is the rule that was in force at the time. If there is any question about that I will clear it up a little more. It is in the evidence, but there will be other witnesses who know about it. Mr. Urbahns is here and I expect to call him as a witness.

The Court: I will reserve ruling on that at this time.

Mr. Boyle: We will clear it up.

JOHN F. ROE, re-called on behalf of defendant, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Mr. Roe, when you were on the witness stand this morning I forgot to ask you the number of the engine that you were operating at the time Mr. Moquin was injured; what was the number of the engine?

A. I think it is 487.

Mr. Davis: That was 487?

Mr. Boyle: 487: If there is any question about it——

Mr. Davis: Well, all I know is from your government report.

[fol. 236] Mr. Boyle: Well, that is my understanding of it, that it was 487.

A. I think it was.

Mr. Davis: And this blueprint is 487?

Mr. Boyle: And this is 487, yes.

Mr. Davis: I guess there is no question about it.

Mr. Boyle: Then we will offer in evidence Defendant's Exhibit 4, which shows the weight and things of that kind, measurements, of the engine. Any objection?

Mr. Davis: None.

The Court: Received.

Mr. Boyle:

Q. You are familiar with these drafts, are you?

A. No, I am not.

Q. Locomotive engineers don't have to do with those?

A. No, sir.

Dr. William H. Schnell, called on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Where do you live, Doctor?

A. Superior, Wisconsin.

Q. How long have you lived in Superior?

A. More or less all my life.

Q. Are you a physician and surgeon?

A. Yes, sir.

Q. How long have you been practicing your profession?

[fol. 237] A. Since 1912.

Q. Of what medical school or schools are you a graduate?

A. Milwaukee University, Milwaukee, Wisconsin.

Q. When did you finish at that school?

A. In 1912.

Q. Have you been practicing your profession ever since that time?

A. Yes, sir.

Q. What has been the general nature of your practice?

A. General practice, the major portion being industrial surgery.

Q. Are you connected with the Soo Railway Company?

A. Yes, sir,

Q. What position do you have with the railway company?

A. Medical examiner is my official title.

Q. You look after that work for the company at Superior?

A. Yes, sir.

Q. Did the plaintiff, Mr. Moquin, come under your care after he was taken to Superior on February 27th, 1929?

A. Yes, sir.

Q. How did you first learn that Mr. Moquin had been injured?

A. Through the dispatcher's office notifying me that he was injured and being sent to Superior on the train.

[fol. 238] Q. And what did you do then?

A. I met the train with an ambulance and had the man transferred from the train to St. Mary's hospital in our city.

Q. Did you go to St. Mary's hospital with him?

A. Yes, sir.

Q. Did you examine Mr. Moquin after he got to the hospital?

A. Yes, sir.

Q. Then did Mr. Moquin remain under your care for sometime after that?

A. Yes, sir.

Q. Some X-rays have been introduced in evidence in this case.

Mr. Davis: Have you Dr. Schnell's X-rays here?

Mr. Boyle: Yes, they are here if you wish them.

Q. You have your X-rays haven't you, Doctor?

A. Yes, sir.

Q. Suppose you get those. I am perfectly willing to have them used. First let me ask you what examination

did you make of Mr. Moquin when you took him to the hospital from the depot?

A. Examination was made to ascertain what his injuries were and his clothing was removed and different parts inspected that warranted examination.

Q. In that connection did you make some X-rays?

A. I had X-rays made. I didn't make them, but they were made under my direction and supervision.

[fol. 239] Q. Those are the X-rays that you have just brought here?

A. Yes, sir.

Q. Will you pick out the X-ray that you have for the right leg or right foot?

A. There is the X-ray of the right foot. That is both right and left, one marked right and the other marked left.

Q. What is Defendant's Exhibit 5?

A. It is an X-ray film of the right foot and an X-ray film of the left foot.

Q. Is that one of the X-rays that was taken under your supervision at the St. Mary's Hospital?

A. Yes, sir.

Q. Of the plaintiff in this case?

A. Yes, sir.

Q. And then do you have an X-ray of the right arm?

A. Well, I have some more of the foot, too, different views.

Q. Let me ask you first about this X-ray that was received in evidence which is marked Exhibit C; which of your X-rays will correspond to that?

A. The one I just showed you is closest of the foot.

Q. Will you then examine your own X-ray, which is marked Defendant's Exhibit 5, and the X-ray marked Plaintiff's Exhibit C, and let us know whether you find the same fractures on one of these X-rays as you find on the other?

A. Yes.

Mr. Davis: May I ask one question?

[fol. 240] Mr. Boyle: Yes.

Mr. Davis:

Q. Dr. Schnell, of course, your X-ray was taken a day or two after the accident?

A. Taken the same day and the second day.

Q. That, of course, would show much more clearly the condition of the foot, that is, the fractures appear much clearer than they would three months later?

A. Yes, sir.

Q. There would be callus forming and all that?

A. Yes.

Q. So that the X-ray taken the day of the accident would more clearly show the fractures?

A. Yes, sir.

Mr. Davis: Yes. All right.

Mr. Boyle: The other X-ray that you have, Doctor, was taken, as I remember the date, May 25th, 1928.

Mr. Davis: Yes.

Mr. Boyle:

Q. So that between February 27th and May 25th there would have been some healing, would there not?

A. Yes, sir.

Q. The fractures ought to be more distinguishable in your X-rays than in the later ones?

A. Yes, sir.

Mr. Boyle: Very well, we will offer in evidence Defendant's Exhibit 5.

Mr. Davis: No objection.

The Court: Received.

[fol. 241] Q. Do you have an X-ray of the right arm?

A. No.

Q. You have some more X-rays of the feet if the attorneys care for them?

A. Yes.

Q. Do the other X-rays show anything different from those?

A. As far as the feet no particular change.

Mr. Davis: That includes the ankle, I believe.

Mr. Boyle: Not much of the ankle.

Mr. Davis: Have you an X-ray showing the ankle?

A. Yes, sir.

Mr. Boyle: Well, we had better have that.

Mr. Davis: Yes.

Mr. Boyle: Just so we get a full set of them.

Q. Tell us, then, Doctor, what Defendant's Exhibit 6 is?

A. That is an X-ray film showing the right lower leg and the greater portion of the right foot and ankle.

Q. How does that compare with this other exhibit which is in evidence, Plaintiff's Exhibit A?

A. About the same view.

Q. Only here again your X-ray was taken immediately following the accident, on the same day or the next day, and the other X-ray, Plaintiff's Exhibit A, was taken later?

A. Yes, sir.

Mr. Davis: That is the right foot?

A. Yes.

Q. In two different positions?

[fol. 242] A. Two different positions of the same leg.

Mr. Boyle: Then we better have this in evidence.

Mr. Davis: Yes.

Mr. Boyle: We will offer in evidence Defendant's Exhibit 6.

Mr. Davis: No objection.

The Court: Received.

Mr. Boyle:

Q. Did you get an X-ray of the right arm, Doctor?

A. No, sir.

Q. What is Plaintiff's Exhibit B?

A. It is a lateral view of the right ankle and lower leg.

Q. What do you mean by lateral view?

A. Side view. And I guess the other one, left one, too, I presume.

Q. What other examination did you make, what physical examination did you make when Mr. Moquin came to the hospital?

Mr. Davis: May I inquire one thing. Did you make an X-ray of his back?

A. Yes, sir.

Q. Have you those with you?

A. Yes, sir.

Mr. Davis: That is all. Go ahead.

Mr. Boyle:

Q. And what other physical examination did you make, Doctor?

A. I made a thorough examination of him examining different parts of his body.

[fol. 243] Q. In order to complete the record, what other X-rays have you?

A. Other view of the same parts mentioned so far, plus X-rays of his back.

Q. What did you find upon that examination that you made on the day of the accident?

A. That he had a fracture of the right tibia or shin bone, a slight fracture in the right fibula, the smaller bone in the right leg. That he had a swollen, discolored left ankle, that he complained of pain in his lower back. That is what I found the first day.

Q. And then what treatment did you give Mr. Moquin?

A. As these various areas were X-rayed then he was put to bed, hot applications applied to the injured parts. Then a few days later a cast was applied to the right ankle and lower leg.

Q. How long did Mr. Moquin stay at the St. Mary's Hospital?

A. He remained there until about March 17th, or 18th.

Q. And was he under your care during all of that period?

A. Yes, sir.

Q. Then did he leave the hospital?

A. Yes, sir.

Q. Where did he go?

A. To his home.

Q. What, if any, other conditions did you find so far as these injuries were concerned while Mr. Moquin was in the hospital?

[fol. 244] A. A few days after the day of the accident he complained of some numbness in the right little finger and the outer portion of his right hand.

Q. That was a few days after the accident?

A. That is when my attention was first called to it, yes, sir.

Q. Were there any other conditions that you found and learned about while Mr. Moquin was at the hospital?

A. None other than so far stated.

Q. When Mr. Moquin left the hospital he went to his home?

A. Yes, sir.

Q. Was he able to get about at that time?

A. He could get around on crutches.

Q. He was able to get around on crutches at the time he went to his home?

A. Yes, sir.

Q. Was his leg still in a cast?

A. Yes.

Q. You put the right leg—let's see, the right one was the one that was more severely injured?

A. Yes, sir.

Q. Did you put the left leg in a cast also?

A. No, sir.

Q. Did he have the use of that left leg while he was in the hospital?

A. Not immediately, but he did before he left the hospital.

Q. About how long before he left the hospital did he have the use of that left limb?

A. To some degree in about two weeks.

[fol. 245] Q. What did you find about that left leg?

A. The left foot and ankle were swollen and discolored when I first saw them and it slowly subsided under treatment while at the hospital.

Q. What was the condition of that left leg when he left the hospital?

A. There was some swelling still present and some discoloration, but he was able to bear his weight on it so he could get around with the aid of crutches.

Q. While Mr. Moquin was in the hospital, and particularly so when you learned of this numbness, did you make an examination of his right arm?

A. Yes, sir.

Q. What did you find upon that examination?

A. I could find nothing other than his statement that it was numb. I couldn't find any swelling or any discoloration or any bruises, but he complained that there was numbness there in his right little finger and the outer portion of his right hand and up the forearm a little ways.

Q. Up the forearm?

A. A little ways.

Q. Did you see the X-ray that has been introduced in evidence as Plaintiff's Exhibit D? I think you saw that X-ray this noon, didn't you, Doctor?

A. Yes, sir.

Q. You made an examination of that this noon?

A. Yes, sir.

Q. What, if any, injury is disclosed by that X-ray?

A. I do not see any injury in the X-ray there of that [fol. 246] elbow joint.

Q. How do you account for the numbness in Mr. Moquin's fingers, what did that come from?

A. Well, I presume it came from some what you might term pressure or condition of the nerve that has distribution in that area.

Q. Did that arm continue to bother Mr. Moquin while he was in the hospital?

A. Yes, sir.

Q. When Mr. Moquin went to his home did he remain under your care for some time?

A. Until about—as I recall it, May 21st, 1928, is the last time I saw him.

Q. And when was it he left the hospital?

A. I think March 18th. I am not just accurate as to that, but it was March 17th or March 18th, 1928.

Q. So that it was approximately two months after Mr. Moquin went to his home that he remained under your care?

A. Yes.

Q. About how often did you see him during that period?

A. Well, I saw him two or three times a week at his home and then he came down to my office as often as was necessary.

Q. What was his condition at the close of that period?

A. When I last saw him?

Q. Yes, the last time you saw him while he was under your care?

A. Well, there was a gradual improvement. He was able [fol. 247] to walk better. The cast was removed from the right leg. He was able to bear weight on both feet and get around much more readily. Still complained of pain in his back to some degree and the numbness in his right little finger and outer side of his right hand, but there was a gradual favorable improvement.

Q. Then did you see Mr. Moquin again after that?

A. Yes, I saw him once after that in another capacity.

Q. But you did not make any examination of him for this injury at that time?

A. Well, indirectly I did. This was with reference to a board of pensions, I think. I did not feel as though I should be active in the examination. I did not indulge in it actively, but I saw him.

Q. That was in connection with some other business of Mr. Moquin's, was it?

A. Yes, sir.

Q. Then did you see him again after that?

A. I don't think I saw him again until today.

Q. An arrangement was made so that you could examine Mr. Moquin with some other doctors today?

A. Yes, sir.

Q. Did you take part in that examination?

A. Yes, sir.

Q. Will you tell this jury what Mr. Moquin's condition is at the present time? Let us take up first his right leg.

A. There is some swelling in the ankle joint; that is, the [fol. 248] right ankle joint is a little bit larger than the left. He is able to walk quite satisfactorily on that foot. He has good lateral motion in the joint.

Q. What do you mean by lateral motion in the joint?

A. Movement of the foot sideways. The foot can be moved sideways.

Q. All right.

A. Then the up and down movement, the down movement is normal; the upward movement there is some restriction there. It is not quite the same as in the left ankle.

Q. The lateral movement you said was what?

A. Was about normal.

Q. The lateral movement was normal and moving the ankle up and down you say the down movement is normal?

A. Seems to be, yes, but he didn't seem to be able to move the foot upward to probably the same degree that he did in the opposite foot.

Q. The upward movement of the ankle is less than normal, then?

A. It seemed to be.

Q. Tell us about that right ankle or the right leg. I am asking you about the right leg.

A. The right leg other than the ankle seemed to be normal. The musculature is firm. There is no impairment in the knee joint. There is no impairment in the hip joint. There is no evidence of any paralysis of the knee, [fol. 249] the muscles of the right leg, the ankle or foot. He bears weight well. That seems to be about as far as I could determine.

Q. Is there a permanent injury in that ankle, Doctor?

A. I think the ankle probably has some permanent injury in there. I would say the injury consists primarily of possibly a little lack of upward movement.

Q. Would that injury be of such a nature that it would keep Mr. Moquin from doing ordinary work?

A. I don't see why it should.

Q. Will you take up and tell us about the left foot?

A. Well, at this time I do not find any abnormality in the left foot whatsoever; seems normal in every respect.

Q. Then tell us what your opinion is regarding the right arm?

A. He still complains of some numbness in the right little finger and a portion of the right ring finger. The numbness is not nearly so apparent or extensive now as it was when I first saw him.

Q. Did you have some way to determine when you first saw Mr. Moquin about this numbness outside of what he told you about it?

A. Well, just a matter of examination, pressure and so on. The function of the muscles, that is, the movement of the fingers, was not impaired, but he said they felt numb and a sort of a prickling sensation he could feel in there at times.

[fol. 250] Q. You got the impression that he did have that sensation there?

A. Yes.

Q. Did you understand from Mr. Moquin today that there was still some prickling sensation in those fingers?

A. That is what he says.

Q. But that, as I understand your testimony, is greatly improved from the time that you saw him last?

A. Yes, and he said so himself.

Q. What is your opinion about that right arm, is that going to disable him in any way?

A. No, I think as time goes on that will all wear away.

Q. What about the back? What is your opinion about the conditions of the back?

A. Well, he says the lower part of his back is still sensitive. There is no interference in the movements of the back in any way. He can bend his back in any position without any discomfort apparently, but he says it is still a little sensitive in the lower part.

Q. What is your opinion as to whether there is any permanent injury there?

A. I don't think there is.

Q. Is there anything about the condition of that back that will keep Mr. Moquin from doing ordinary work?

A. No, none whatsoever.

Q. Then, Doctor, do I understand you correctly that your opinion is that the only permanent injury is the injury to [fol. 251] the right ankle that you have described?

A. Yes, sir.

Cross-examination.

By Mr. Davis:

Q. Dr. Schnell, in making tests for pain in the back you had no reason to doubt that he had pain in the back, did you?

A. No, sir.

Q. And of course reactions are obtained not only by what the person says, but as you press the involuntary flinching of the patient?

A. Yes, sir.

Q. And every time you examined his back you found that pain there to a greater or less degree?

A. To some degree.

Q. And of course as long as that pain continues it would naturally affect him in working, wouldn't it? Pain always does, and especially in the back?

A. Well, it all depends on the character of the work and the continuance of the pain they have.

Q. Well, I mean hard work. I mean climbing up and down cars, lifting heavy weights and walking rapidly to

get out of the way of moving cars, crossing tracks with uneven surfaces, that naturally would be a greater strain on the back than if he were just walking on the street?

A. I don't think it would interfere with his walking or moving around in locomotion. I think the time when it is more painful is when he sits down.

Q. Why is that?

[fol. 252] A. Probably some strain on the lower part of the back where he sits on.

Q. What would cause that?

A. Some strain of the ligaments there and sitting on that area may aggravate it a little bit.

Q. Why should it continue so long, fifteen months?

A. Well, I don't know just how painful it is at this time.

Q. Well, he has testified it is painful for him to sit down.

A. Well——

Q. That he cannot sit down on a hard substance, his testimony is to that effect?

A. A good deal of it is hearsay.

Q. We will grant that. Assuming that he has told the truth in this instance, Doctor Schnell, that it does pain him and that it has pained him ever since the injury and the pain is still there, why should it continue so long?

A. Well, probably due to ligamentous interference. The ligaments that connect the bones together have got stretched some. And slow to recover.

Q. You would expect it to repair itself in less than fifteen months?

A. Well, some are slow.

Q. And some are very slow?

A. Yes, sir.

Q. Some bother a man for years, isn't that true?

A. Well, I have never seen any that bothered.

Q. Over fifteen months?

[fol. 253] A. Not a great deal longer unless they are quite severely injured.

Q. Well, not over fifteen months unless they are quite severely injured?

A. Well, I say I haven't seen any.

Q. Have you ever read of them where there has been tearing of ligaments at the lower part of the back near the coccyx bone where that pain would continue for years and bother the patient?

A. Not just from a strain.

Q. But from a tearing of the ligaments?

A. Well, strain and tearing the ligaments are more or less synonymous.

Q. Now, those ligaments, as they bind that part of the spine, bind tight around there, do they not, and they are pretty well protected, nature protects them pretty well?

A. The area that is involved is the shape similar to what my finger would show (indicating). That is the part that is hurt.

Q. Yes and that is pretty well protected, isn't it?

A. Well, some.

Q. It would take quite a severe blow to injure that part of the back, wouldn't it, and cause pain for all this length of time?

A. Yes, quite.

Q. And you are not able to give the jury a definite statement as to how long this will continue, are you?

A. I couldn't say exactly how long. Sometimes they clear up quite readily. Certain factors may prolong the [fol. 254] condition.

Q. Now, with reference to his right foot; you have seen him here in the court room, have you?

A. Yes, sir.

Q. And you saw him when we turned him over to you for an examination this noon?

A. Yes, sir.

Q. He doesn't walk normally, does he?

A. He favors his right ankle.

Q. And you would say there is no reason for him favoring that right ankle, wouldn't you?

A. He has a sufficient reason, I think.

Q. That is the injury he sustained?

A. Yes, sir.

Q. And he never will have as good a leg or as good an ankle as he had before, in your opinion, will he, be permanently injured?

A. I do not think it will be a hundred per cent recovery.

Q. And, Doctor, this examination to which you made reference, you learned that he was a former Spanish war veteran, I believe?

A. Yes, sir.

Q. And this examination you made at that time was in conjunction with others?

A. Yes, sir.

Q. You made a report of his condition, did you not?

A. Yes, sir.

Q. Did you not report to the government of this country that he was seventy per cent disabled? Yes or no.

[fol. 255] A. That report is confidential.

Q. That report may be, but your testimony is not.

A. I have no——

Q. Your testimony is not.

A. I have no authority to quote what report this board made; in fact, I don't know.

Q. Well, don't you know that you reported, and don't you know that you, with the rest of the doctors, reported that he was seventy per cent disabled from working?

A. No, sir, I didn't report that, nor did any other doctor report that.

Q. What percentage of disability did you report? Now, is that confidential?

A. That is confidential and the patient has no knowledge of what the board communicated.

Redirect examination.

By Mr. Boyle:

Q. Do you think you are in a position to form an opinion with reasonable certainty as to how long his disability is likely to continue. Of the right leg, I mean?

A. Well, there are factors that enter into it. Frequently such a scene as this has a faculty of influencing the mind that may favor the condition, but I think that if he conducts himself normally, sooner or later he will overcome that favoring.

Q. What would be your opinion as to when Mr. Moquin will be able to do ordinary work, that is, whatever work he is going to be able to do, with the limitation of motion [fol. 256] that you say he has in that ankle?

A. Well, now, judging the man from other experiences that I have had with him—I took care of him for another injury in the same ankle and the same leg—he was slow in recovering then and had quite an impaired ankle at that time, but he went back to work limping and as time went on

he gradually overcome the handicap and had quite a satisfactory foot and ankle. Judging from that, I should think that in the very near future, if he conducted himself now as he did then, he would have quite a fair ankle at this time.

Q. How long ago was that other injury, Doctor?

A. I think that is about three or four years ago.

Q. I think perhaps that the X-ray shows that bone very well for a fracture?

A. Yes, sir.

Q. And calling your attention to this X-ray, Plaintiff's Exhibit A, just holding it up before the jury, point out the bone that you took care of.

A. This bone is called the fibula, small bone on the outerside of the leg. It was broken at this point about five inches from the end of the bone, from the ankle joint.

Q. And did you take care of Mr. Moquin at that time?

A. Yes, sir.

Q. I understand from your testimony that so far as that fracture was concerned his leg got all right again, so that it was about——

[fol. 257] A. Just about all right.

Q. So that at the time he received this injury on February 27th you think that his leg, at least so far as the old injury was concerned, was about all right?

A. He did his work in a normal fashion.

Recross-examination.

By Mr. Davis:

Q. In the condition he now is as he moves about with the condition of this ankle, if he were an applicant to go switching over uneven tracks and going rapidly, you would not pass him, would you?

A. The way he conducts himself today. Before I would.

Q. The reason for that is because his ankle is in such a condition that you figure it would be unsafe for him to do that work, both night and day, walking rapidly over uneven surfaces, isn't that true?

A. To some degree, yes.

Q. In other words, you know from your own experience, Doctor, that a switchman's work or a brakeman's work is not only rapid work, but dangerous work, isn't it?

A. Yes, but as I said a minute ago, he went to work as brakeman with the old injury and it wasn't well by any means, but it gradually got well.

Q. Did you tell him to go to work before it was well?

A. Yes, sir, and he did. That is, I didn't tell him. He went to work.

Q. Well you told him he was well enough?

[fol. 258] A. It was all right to go.

Q. Yes.

A. By favoring it.

Q. Yes. How long was he laid up that time?

A. I don't know, but it was quite a long time.

Q. Yes, eight or nine months, wasn't it, Doctor?

A. Something like that.

Q. Now it is fifteen months since his injury and he is still not able to walk normally?

A. He doesn't walk normally.

Q. Well, you would say that he isn't able to, wouldn't you, Doctor, just to be fair to him and to be fair to everybody?

A. Well, he favors it probably as much as he needs.

Q. Well, would you say he favors it more than he needs? Just let's get your opinion on that matter, Doctor?

A. Well, my own confidential opinion is——

Q. That is what we want.

A. That he is favoring it.

Q. In other words, your own confidential opinion as a doctor for the railroad company is that he is favoring it more than he needs?

A. I am comparing it with his old injury, with an accident similar in character, similar in result. His attitude was probably a little different then than it is now.

Q. Yes, his attitude was different. He followed all your instructions that time and now he hasn't quite followed all your instructions, is that it, Doctor?

[fol. 259] A. I haven't seen him as a patient since May, 1928.

Q. Yes, I know you haven't.

A. A year ago.

Q. Are you now willing to state to the jury that you do not think he needs to walk with the impairment he does walk with, would you state that to the jury, Dr. Schnell? You have seen him; he is right here.

A. Yes, I know.

Q. Would you like to have him walk towards you?

A. No, it isn't necessary. I know the man and know what he can do.

Q. Yes, and knowing the man and knowing what he can do, you know he has not now a normal foot, don't you?

A. I will admit his foot is not normal.

Q. You know he has an impairment of that foot?

A. Yes, sir.

Q. You know that he has a permanent impairment of that foot?

A. To some degree, I think.

Redirect examination:

By Mr. Boyle: To what degree do you think that is so far as the foot is concerned, could you give us that in percentage?

A. I don't think it will eventually be very much. I wouldn't think he had a handicap of over, oh, ten, fifteen or twenty per cent, something like that.

[fol. 260] Recross-examination.

By Mr. Davis:

Q. Oh, just one other question. I wonder where his X-ray of the back is.

A. It is up here.

Q. Now, where does the coccyx bone come in here?

A. This (indicating) is the sacrum and everything below that is the coccyx.

Q. Where is the coccyx?

A. That is here (indicating).

Q. What is that black? That is the coccyx right there isn't it?

A. This portion from here on is the coccyx.

Q. And what is the black?

A. It is a joint.

Q. It is not a break?

A. Do you mean this area here?

Q. No, this area here?

A. That is a joint.

Q. The black area here is what?

A. That is bowel. That is gas in the bowel.

Q. All right. I see. That is all, Doctor.

Mr. Boyle: Mr. Davis, do you care for any other of those X-rays?

Mr. Davis: No, just what you have introduced there.

Dr. J. R. KUTH, called on behalf of defendant, duly sworn, testified as follows:

[fol. 261] Direct examination.

By Mr. Boyle:

Q. Where do you live, Dr. Kuth?
A. At Duluth.
Q. How long have you lived in Duluth?
A. About twenty-five years.
Q. What is your business or occupation?
A. Physician and surgeon.
Q. How long have you practiced your profession?
A. Nearly twenty-five years.
Q. Were you a graduate of some medical school?
A. Yes, sir.
Q. What school did you finish at?
A. The University of Minnesota.
Q. When did you finish there?
A. In 1904.
Q. Did you take some other work after you left the University?
A. Yes, sir.
Q. Tell us where and what work you took?
A. It was abroad, at the University of Vienna, University of Berlin and at Liverpool and also at the Orthopedic Hospital at Boston.
Q. How much time did you spend in that post-graduate work.
A. About a year and a half.
Q. And did you take that post-graduate work with some special part of the medical profession in mind?
A. Yes, sir, I devoted it entirely to one branch.
[fol. 262] Q. What branch was that?
A. To orthopedic surgery.

Q. And when was it that you took this post-graduate work?

A. In 1913 and 1914.

Q. Since that time have you practiced as a specialist in orthopedic surgery?

A. Yes, sir.

Q. That is now your practice; you specialize in that branch of the medical profession?

A. Yes, sir.

Q. You are not connected with the Soo Railway Company?

A. No, sir.

Q. Or with any other railway company?

A. No, sir.

Q. Not acting as medical examiner or agent or in the employ of any corporation?

A. No, sir, I am absolutely independent.

Q. You are an independent practitioner?

A. Yes, sir.

Q. Dr. Kuth, did you at my request make an examination of Noah Moquin, the plaintiff?

A. Yes, sir.

Q. Refer to your notes if you wish to and tell us when that examination was made?

A. After the accident of February 27th, 1928, I first saw Mr. Moquin on October 22nd, 1928, and I examined him at that time.

Q. Tell us what examination you made at that time.

A. The history was obtained from him as to the manner [fol. 263] of the occurrence of the accident, his complaints were elicited and a physical examination was made with the man stripped and also X-ray films were made.

Q. Tell us how you understood the man was injured. Does your report show?

A. He stated that he was injured on February 27th, 1928, while standing on top of a box car, the car went off the track, causing him to be pitched off a distance of about twenty feet on ice, striking on both feet and then falling onto his buttocks and onto his right arm.

Q. You understood that he received some medical treatment at the hospital in Superior?

A. Yes, sir, he told me he was taken by train to Superior where he was transferred to St. Mary's Hospital and was there for some time.

Q. What did you find out as to the complaints made by Mr. Moquin at the time you first examined him this time that you are now talking about?

A. Well, he complained as to his right leg, of pain and stiffness in the right ankle, pain and soreness in the right heel, running up the back of the right calf past the knee and the thigh, especially after walking a block or so, and also of pain in the heel extending up the back of the calf into the lower back, into the region of the coccyx and sacrum. He complained of soreness and tenderness on the bottom and back of the heel of the left foot and of pain over the front of the left ankle and pain over the back of the foot [fol. 264] and in general a weakness in both legs. And also on the left side of pain and stiffness running from the back of the left heel to the calf, up the back to the thigh into the lower back, into the coccyx and also sacrum, and of the right upper extremity he complained of a buzzling feeling, as he expressed it, and a thumping extending from a point about three inches above the outer condyle of the elbow, the outer condyle of the elbow or outer angle here of the prominent bone, from a point two or three inches above that on the outer side downward, in general, over the ulnar side of the forearm into the last two fingers. I think occasionally the pain would go into the rest of the fingers and that they would feel numb. He further complained that the fingers were clumsy, lack of control of the hand, and that most of the trouble was in the hand but the arm in general was in pretty good shape and did not make much complaint relative to the arm as a whole. He furthermore complained of pain and soreness in the lower back, in the lower part of the spine, and he complained of tenderness on direct pressure over this area and also pain on bending forward or walking or lying down, or rather if he would lie down too long, and pain rolling over. He made other general complaints of loss of bowel control and frequency of urination. I think that comprises the complaints which he made to me.

Q. You have told us, have you, Doctor, about the complaints Mr. Moquin made to you at the time of this examination.

A. Yes, sir.

[fol. 265] Q. Did you make a physical examination at that time?

A. Yes, sir.

Q. You made your own examination?

A. Yes, sir.

Q. Tell us what you found upon your examination.

A. Mr. Moquin measured about—that is, he was examined stripped, and he measured five feet six inches in height and weighed in that condition 183 pounds. He appeared to be exceptionally well muscled, well nourished and had the general appearance of excellent health. In walking he did so with the right leg, ankle and foot held stiffly and everted.

Q. What do you mean by everted?

A. Turned out. He had a scar over the left side and left upper back, left loin, which was not related to the accident, but was due to an operation some years previously for an abscess, was not related to the accident, but there was a very prominent scar which is very obvious over the left loin. The measurements show both lower extremities to measure the same in length and both legs measure the same in circumference at the different corresponding places; that is, considering the thigh, the upper and lower thigh, the knee and the calf, except that the right calf measured possibly half an inch less in circumference than the corresponding place on the left side.

Q. I didn't quite get that.

A. The right calf measured at that time about half an [fol. 266] inch less in circumference than the same place on the left calf.

Q. All right. Go ahead.

A. Both upper extremities had the same appearance and both upper arms and the forearms measured the same in circumference. There was no appreciable difference in the size. When standing there was noted no deformity in his back, palpation of the back showed nothing obviously abnormal. Tenderness was complained of over the lower portion of the sacrum and in general over the whole sacrum, the whole sacral area. The examination of the back further showed he had movements, no muscle spasm in any of the lower back muscles, the movements were present in all directions to a fairly normal extent. Both shoulders and upper extremeties likewise appeared to be of the same size and the form and movements of the shoulder joints were normal. Do you want me to complete it?

Q. Yes, go ahead.

A. The head and neck movements normal. Hip and knee movements normal. The alignment of both lower extremities, the legs, appeared to be about the same. There is nothing abnormal about them. There was felt some moderate thickening in the bony prominence on the inner side of the right angle. There was furthermore noted a condition of double sided flat foot, with moderate extension movements at that time. I am speaking of the examination in last October. Movements in both feet and ankles were re- [fol. 267] stricted actively, that is, voluntarily. Both the feet and the toes were held tense during attempted manipulation. At times when the man was distracted freer motion was obtained, but never complete, normal movement in either foot or ankle. Downward movement of the foot at the ankle was about normal. Upward movement of the right foot at the ankle was slightly limited on the right side. This active restriction of the movements that I just referred to was the lateral movements, the side movements of the foot.

Q. I am not sure that you are making that as clear as it ought to be, Doctor.

A. The difference between the movements? Well, in the right foot at that time downward movement of the foot at the ankle——

Q. You mean the ankle moved downward like that (indicating)?

A. Yes. That was about normal.

Q. Yes?

A. The upward movement or opposite movement was slightly limited.

Q. Yes?

A. The side movements, where you take the foot and move it sideways, these movements were actively restricted; that is, they were voluntarily restricted on the part of the man, either consciously or unconsciously, during the examination.

Q. I see.

A. So we couldn't get it clear as to the extent of that particular movement at that time, and the movement of the other foot was likewise restricted during the examination [fol. 268] and during the tests as they were carried out to obtain that movement. Furthermore, the movement, the

so-called straight leg raising, was free on both sides. That means flexion of the hip when the knee is held fully extended. Sensation about the sacrum and the lower back was normal to touch, pin prick and cotton. Further general examination for stability and for co-ordination, for sensory disturbances, in the right hand and upper extremity showed no obvious abnormalities. The reflexes of the lower extremities were normal on both sides and no abnormal reflexes were noted. He had an enlarged and diseased tonsil on the right side. The left tonsil was small and had some deposits, but not as obviously diseased as the right one. His blood pressure measured 140 systolic and 45 diastolic. His pulse rate was some accelerated. It was more rapid, due to the excitement of the examination evidently. Rectal examination, that is, the finger put into the lower bowel to palpate the coccyx, showed no obvious deformity or loss of movement or evidence of fracture. His prostate was moderately enlarged and quite tender on palpation, on touching it during the examination of the lower back by way of the rectum. I believe, aside from that, the examination was negative. I believe that comprises the general physical examination carried on.

Q. You took X-rays, I suppose, during your examination also?

A. Yes, sir.

Q. You have X-rays that would match with these that are [fol. 269] in evidence of the ankles and the legs particularly?

A. Yes, I have some that correspond with those.

Q. I think perhaps we better get your set of X-rays. When were those taken?

A. They were taken on October 22nd.

Q. That would be several months later. You can handle those better than I can. This is Plaintiff's Exhibit A; will you get your X-ray, or one of them, that will match with this, give us the same view, the same part of the limbs?

A. This one corresponds to this X-ray picture.

Q. This is yours?

A. No, this is my X-ray picture.

Q. You have one that would correspond with this?

A. Yes, that is taken the same way, showing both ankles and the lower part of the legs and the position front to back.

Q. Let me have your X-ray and I will have the reporter mark that one. That is Defendant's Exhibit 7; that is your X-ray?

A. Yes. This has my mark on it.

Q. What does Defendant's Exhibit 7 show?

A. It shows a little fracture in the lower end of the fibula; that is the small bone; and it shows some thickening along the inner side of the larger bone, the tibia, some four inches or so above the joint margin of the ankle and it shows some irregularity in between, which one I can't say. There may have been other fractures which are not obvious at this time. It furthermore shows some slight irregularity along [fol. 270] the inner side of the ankle joint, but aside from that shows a fairly well defined fork formed to receive the ankle joint bone; the ankle bone shows no obvious deformity as a result of fracture except from the well-healed one in the lower end of the fibula.

Q. Have you an X-ray that will match with Plaintiff's Exhibit C?

A. Which is that?

Q. This one.

A. Well, those I presume are both ankles made on one film. I have the same view with each ankle made on separate films.

Q. Let me have both of your X-rays, then, of the ankle. Now, these X-rays which are marked Defendant's Exhibit 8, what is that picture?

A. That is the left foot and left ankle and the lower portion of the left leg, taken from the side position.

Q. What does that X-ray show?

A. It shows no obvious abnormalities. That shows no evidence of fracture or other injury.

Q. That is the left leg?

A. That is the left leg.

Q. You have this other X-ray, Defendant's Exhibit 9, what is that?

A. That is the same view, showing the same parts, but taken of the right foot and ankle and lower leg.

Q. What does that X-ray show?

A. That shows the fracture in the fibula, in the lower end of the fibula, some four or five inches above its lower tip, [fol. 271] and also shows some general thickening in the lower end of the larger bone, the tibia, and shows the rem-

nants of a fracture or a small fragment through the front portion of the tibia just at the ankle joint and probably extending into it.

Q. Here is Plaintiff's Exhibit B. I didn't show you Plaintiff's Exhibit B, did I?

A. Well, this shows the same views that were just discussed in those last X-ray films which were considered.

Q. Defendant's Exhibits 8 and 9?

A. Yes, except it shows the right leg and the left—I mean the right ankle and the left ankle and the bones of each leg on the same film.

Q. Now, have you an X-ray that will show any view of the limbs that will disclose anything that cannot be seen on these other X-rays or do these X-rays now cover the legs pretty well?

A. They cover the legs well. There is one large picture showing the complete bones of both legs below the knee, just to show the alignment, showing that the alignment is practically normal.

Q. Just let me have that one marked. Now, Doctor, this X-ray is now marked Defendant's Exhibit 10; just hold it so the jury can see and tell us what that shows.

A. That shows the left leg, the bones of the left leg from the knee down. This is the knee joint down to the ankle joint. This is the ankle joint; this is the smaller bone and this is the larger bone. This is the left leg. This is the [fol. 272] right leg, shows the same bones and shows the fractures which were just discussed, showing one here and showing the remnants of one which is hardly visible going through this portion of the bone, and it doesn't show any other abnormalities aside from that.

Q. Doctor, here is an X-ray that I would like to have you look at, Plaintiff's Exhibit D. Do you have an X-ray of the arm also?

A. I have one of the right, showing all the bones of the right forearm in two positions and showing the right elbow joint and showing a small portion of the upper arm bone. That is the closest, showing the elbow joint. Mine is taken with the arm more or less extended and this is taken with slightly more than right angle flexion.

Q. Let me mark your X-ray as an exhibit. That X-ray is marked as Defendant's Exhibit 11. Tell us just what that X-ray shows?

A. This X-ray shows both bones of the forearm, the right arm, in the side view, taken this way (indicating), and the other one shows the same two bones taken from front to back or from back to front, and this shows the elbow joint in the side view and this shows the elbow joint in the front to back view and this shows a corresponding view of a small portion of the upper arm bone.

Q. Take that smaller X-ray, Plaintiff's Exhibit D, with your X-ray, and tell us whether you find anything in the X-ray that shows an injury to that elbow?

A. No.

Q. Did you make another examination of Mr. Moquin [fol. 273] after the examination of October, 1928?

A. Yes, sir, I examined him here at Brainerd this morning.

Q. You were present at the examination that Dr. Schnell told us about?

A. Yes, sir.

Q. What examination did you make and what did you find upon that examination this morning?

A. Well, at the examination this morning it was, in general, pretty much as the previous one, except that no rectal examination was made and no X-ray films were made, but the examination this morning showed both ankles to have a fairly normal appearance. He still walked in the same way, with the right foot and ankle everted. The movements in the right foot and ankle were considerably freer; that is, they were not guarded by active contractions as previously, considerable movement of the right foot at the ankle, appeared to be about normal. Upward movement appeared to be still slightly limited. We estimated that he probably is lacking about ten degrees on that upward movement, and lateral movements were still considerably limited. They were still guarded, but between times we were still able to get considerably more movement, so I felt he had probably about a loss of half lateral movements of the foot, especially inversion. Eversion was freer than inversion.

Q. Suppose we make that just a little clearer to the jury.

A. Well, I can probably show you on my own foot. The downward movement this way appeared to be about to the [fol. 274] normal extent, upward it was slightly lacking, probably about ten degrees less than he should bring it

up. These movements (indicating) were limited more; I estimate about one-half of normal.

Q. That is the right leg, that is the one that was injured the worst, wasn't it?

A. Yes.

Q. While we are on that, give us your opinion, please, as to how that is going to affect Mr. Moquin in connection with ordinary kinds of work.

A. Well, only in that it may be painful. How much pain there is there I don't know, but the limitation of movements themselves are not sufficient to interfere with ordinary work.

Q. He did complain of pain in that foot today when you made the examination, did he?

A. Yes.

Q. You took it for granted that there was pain there?

A. Well, with that limitation of movement, I felt that one could assume that there was more or less pain present there on excessive or on active or considerable use of the foot.

Q. How long, in your opinion, is that pain likely to continue?

A. As to that I do not know. I do not know how much pain the man has there. I do not know what the extent of it is or the severity of it. I do not know how much of the time it bothers him. That is something that is entirely subjective and we have no way of knowing, but it was my [fol. 275] opinion that he certainly did not have the pain that he professed to have.

Q. Do you think that so far as the injury to that leg is concerned that he will be able to do ordinary work?

A. Yes.

Q. You think he will?

A. I think he will be able to do a considerable portion of ordinary work.

Q. Assuming that he still continues to have pain in that right ankle, Doctor, what is your opinion as to whether that pain is going to be permanent? I am not sure that I quite understand what you mean yet.

A. Well, the X-ray films show involvement of the ankle joint by the fracture and we have some actual limitation of movement here after a period of about fifteen months,

so I feel that one can assume that there is some permanent disability in that ankle.

Q. What percentage of permanent disability do you think is there?

A. Well, the limitations of movements I have explained, but the per cent of active use I probably would estimate for ordinary purposes at a loss of about twenty per cent of the use of the foot or the ankle joint movement. It is about one-fifth of the foot.

Q. Can you tell us anything else about that right foot now, or have you pretty well covered it?

A. Well, the measurements at both examinations of the right leg showed the musclature to be excellent. The mus- [fol. 276] clature of the leg, the calf, to be good and favor my reason why I think that the man hasn't the disability that he would lead us to believe he has in that foot at this time.

Q. Why is that?

A. Because he has got perfectly good muscles to the right calf, the same practically as on the left side. Which he is using and naturally he has got to use both legs to the same extent. With considerable disuse, considerable disability, in that leg one certainly at this length of time should expect to find considerable wasting of the muscles because of disuse, which he hasn't got.

Q. Have you covered that right leg now?

A. I think I stated there was some moderate thickening of the inner ankle bone.

Q. Yes.

A. That was less evident at the examination today than at the previous examination. So far as the left foot and ankle were concerned, I was not able to see any objective signs of disability in that at all. So far as the right hand and arm were concerned, there were no objective signs of disability there. He still complained the same way except that Mr. Moquin stated that the numbness was not—or I don't know whether he used the word "Numbness" or whether he said this——

Q. Buzzing?

A. Buzzing sensation, that peculiar sensation he stated was some better than it was last October, but there were no objective signs of any nerve injury in the finger, in the hand or arm.

[fol. 277] Q. What is your opinion about that arm, as to whether or not there is any permanent injury there?

A. There is no appreciable permanent disability for ordinary use. The man has perfect use of that hand and that arm.

Q. What is your opinion about the left leg, as to whether there is any permanent disability there?

A. I saw no reason from the examination to assume that there was any disability.

Q. Then is it your opinion that there is none?

A. Naturally is, yes.

Q. Then what is your opinion about the back? Did you make an examination of the back today again?

A. Yes, I made an examination of the back. The back movements were free and easy. There was no deformity in standing and there was noted no muscle spasm during the various manipulations of the lower back. The general nerve tenderness was complained of in the same area as previously. The extent of the tenderness there I do not know. Moderate palpation did not elicit any pain during this particular examination, just moderate, ordinary pressure, and what the extent of the pain in his lower back or in the sacrum is, I do not know.

Q. What is your opinion, Doctor, about whether there is any permanent injury in Mr. Moquin's back?

A. I see no reason to assume that there is from the examinations which I made.

Q. Is there anything about that condition that you can [fol. 278] think of that would keep him from doing ordinary work?

A. No, not after a period of fifteen months to a year and a half.

Q. From when?

A. From the time he was hurt.

Q. Fifteen months to a year and a half?

A. That would be—it is about fifteen months now since he was hurt, as I understand it.

Q. From fifteen to eighteen months?

A. Yes.

Q. You think whatever trouble there may have been to the back ought——

A. To clear up in that period of time.

Q. To be sure that we understand you and that the court and the jury also understand you, Doctor, is it your opinion that Mr. Moquin has no permanent injury excepting the injury to the right leg that you have told us about?

A. Yes.

Q. And that there isn't anything about his injury which will keep him from doing ordinary work excepting the limitation of movement to the degree that you have explained?

A. Well, I would include in that the fact of the involvement of the ankle joint itself by a fracture, because the limitation of movement itself would not produce that much disability. There is nothing in the limitation of movement which would preclude ordinary work.

Q. Then is there anything about the injury that will keep Mr. Moquin from doing ordinary work?

[fol. 279] A. Injury to the right ankle.

Q. I am covering everything.

A. Well, I would say——

Q. After all, what we want to know is whether he is going to be laid up or whether he is going to get better.

A. I think he will have some permanent disability in his right ankle.

Q. That is what you have already told us about. Now what I would like to know is whether there is anything about this accident that is going to keep Mr. Moquin from doing ordinary work, and if not, when, in your opinion, will he be able to go to work?

A. I could put it this way that from injuries such as here undoubtedly occurred, one could ordinarily expect recovery certainly within a year and a half.

Q. And what do you say about this particular case?

A. For ordinary work?

Q. Yes, what do you say about this particular case?

A. Well, I am referring to that and having that in mind.

Q. Then you feel that by the expiration of a year and a half from the date of the injury Mr. Moquin ought to be able to go to work?

A. Yes, ought to be able to do some ordinary work, some forms of ordinary work.

Q. Would that cover all forms of ordinary work except-

ing some work that the limitation in the ankle might keep [fol. 280] him from doing?

A. Yes, or it might——

Q. Or perhaps you can explain what you have in mind.

Mr. Davis: Might what?

A. Might possibly keep him from doing or following certain occupations, as for instance, possibly that of a brakeman.

Q. You think the limitation in the ankle might keep him from working as a brakeman, do you?

A. It might.

Q. What would you think about whether or not he could work as a conductor?

A. Well, I think he probably could. I don't see anything in that occupation, and I will just modify that to this extent, that I think he could. The reason I make that statement is that he could probably follow all the lines of the occupation of a brakeman eventually, except that in a close pinch where something might occur where he is on top of a box car, that something might occur there by reason of the disability of the ankle which would make it insecure at a moment, at a very critical period of time might cause some more severe accident. That would be my only reason for assuming there would be some danger in following the occupation of a brakeman, but I think all the ordinary work of a brakeman he could do, probably the greater portion of it.

(Recess.)

[fol. 281] Cross-examination.

By Mr. Davis:

Q. Dr. Kuth, did I understand you to testify that the measurement of his right calf as compared with his left was a half an inch less than the left?

A. At the examination last October. At the examination this morning they were both equal.

Q. Did you measure the right ankle?

A. I measured the right ankle, yes.

Q. How much larger is that than the left?

A. It wasn't any larger by measurement.

Q. It wasn't any larger?

A. No.

Q. It wasn't three-quarters of an inch larger?

A. No.

Q. Dr. Kuth, you of course know that climbing up the ladder of a moving car in the night or day time is rather dangerous work at best, isn't it?

A. Yes, I presume so.

Q. And requires good feet and legs and good physical condition, you would say, wouldn't you?

A. Yes, I would say so.

Q. You know in railroad work that frequently men have to get up on ladders rather rapidly and run to set brakes?

A. Yes, sir.

Q. You have seen them do it?

A. I am not very familiar with just what the duties of a railroad man are.

Q. But you would not say it would not be pretty dangerous work?

[fol. 282] A. I say it might in a pinch under certain conditions.

Q. And of course if a man could take his time it would be different than if he had to hurry?

A. Yes, I think that would make a difference.

Q. In other words, even if he was getting over it and trying to get over it, unconsciously in a pinch that might affect his safety, might it not?

A. Yes, it would conceivably.

Q. Yes.

A. Just as I stated.

Q. And that would apply, I think, to be fair with the jury and the court, to climbing the ladders of moving trains or running across running boards to set brakes, that would be rather dangerous work?

A. Yes, it might be under those conditions.

Q. And the condition of his foot might imperil him more than if he had no limitation of movement, naturally?

A. Well, that would be the only question, it seems to me, that would come under consideration.

Q. Yes, so far as the ability to do it, but it would be just imperiling his life generally?

A. In a certain given instance.

Q. And the putting of weight on the foot, that is, for instance, if he were using his right foot to shovel with and all of that, at the present time you would state that would be rather a poor policy right today, wouldn't you, for this foot?

A. No, I would not.

[fol. 283] Q. You would think it would be a good thing for him?

A. Yes, I would think it would be.

Q. Just put his weight on it?

A. Active use is what he needs now.

Q. The testimony shows he has walked considerably with his right foot, walked right along as much as he could, at least he says he has walked as much as he could without pain and without resting, that would be a good thing for his foot, wouldn't it?

A. Walking?

Q. Yes.

A. Yes, I think so.

Q. Now, Doctor, we will assume for the purpose of this case that this man has had this difficulty with the two fingers of his right hand from the time of the injury to the present time, assuming that he is telling the truth and that he does have this difficulty and this numbness or paralysis which you found or which he said he had, to what would you attribute that condition?

A. I really could not explain it.

Q. Couldn't explain it?

A. No.

Q. And would an injury to the ulnar nerve be one of the things that would produce that condition?

A. If it were it would have to be a very superficial one and a superficial injury doesn't last fifteen months.

Q. Then if this did last fifteen months, would an injury [fol.284] to the ulnar nerve be considerable of an injury?

A. No, because he has no involvement of the muscles which are also supplied by the same nerve and he shows absolutely no symptoms of muscle involvement.

Q. Assuming, Dr. Kuth, that he has had this pain in the back for the past fifteen months, that he did fall upon his back and immediately complained of severe pain in the back and has complained of it ever since, and assume that is

true for the purpose of my hypothetical question, can you account for that?

A. I would say it was probably due to severe bruises or severe traumatism.

Q. A tearing, perhaps, of the ligaments surrounding that part?

A. No, I think it would be more a direct bruise.

Q. Well, ordinarily you would expect a direct bruise to recover much quicker than that, wouldn't you?

A. Yes, you would.

Q. The fact is, that the longer it continues the more severe would be the nature of the injury, that follows as an axiomatic matter?

A. Well, assuming the man has the complaints he states.

Q. I am asking you to take that assumption, Doctor?

A. Yes, but as we see these injuries, even after an exceptionally severe injury, one would expect recovery in a period of about a year's time.

[fol. 285] Q. Yes, that is a very long period unless the injury is very serious, isn't it?

A. Yes.

Q. You examined him, I believe, twice?

A. Yes, sir.

Q. Today and last October?

A. Last October.

Q. And you have testified, I believe, for railroads before, have you?

A. I believe I have on several occasions. I can recall possibly two occasions.

Q. You have made examinations several times for different railroads?

A. Oh, yes.

Q. For the Duluth, Missaba & Northern?

A. Yes.

Q. For the Soo?

A. I can not remember ever having made an examination for the Soo Railroad.

Q. Northern Pacific?

A. Possibly on one or two occasions.

Q. Great Northern?

A. I can't remember any.

Q. Omaha?

A. No.

Q. What other railroads?

A. That is about all.

Q. You have also made examinations of injured men for the mining companies?

A. For the Duluth & Iron Range possibly.

Q. And also for the mining companies up there, you have [fol. 286] examined a good many injured men for them?

A. If they request examination, I make it.

Q. Well, I say they have requested you frequently, the mining companies, to examine injured men?

A. It all depends upon what frequently means.

Q. I am going to ask you what frequently is, Doctor?

A. Well, I would say that I examine men on their own behalf as much as I do for any insurance company or mining company.

Q. I will ask now about insurance companies, do you also examine for them?

A. Yes, I do.

Q. What insurance companies, how many of them do you represent?

A. Oh, I don't know, whichever requests an examination.

Q. Do you know about how many insurance companies you have examined for?

A. I couldn't tell you that.

Q. Five to ten different insurance companies?

A. No.

Q. In Duluth. Would you say that would be a modest number?

A. I would say it possibly might be that many. I don't know. Oftentimes I examine someone without knowing who the insurance company is, sent to me by someone that I don't know what their connection with any insurance company is.

[fol. 287] Redirect examination.

By Mr. Boyle:

Q. Your practice, you say, has been in examining individuals just as much as it has been to make examinations on behalf of others?

A. Yes, sir.

Q. Or at the request of others?

A. Yes, sir.

Q. And have you in that connection made a good many examinations and appeared in court on behalf of individuals against insurance companies?

A. Yes, sir.

Q. And against railroad companies?

A. Yes, sir.

Q. And other similar corporations, including the Street Railway Company in Duluth?

A. Yes, I have testified on their behalf and on behalf of claimants against them.

Q. So far as your practice is concerned, Doctor, you have no regular connection with any kind of a concern of that kind?

A. None whatever.

Q. There was some testimony from Mr. Moquin when he was on the stand—I guess you didn't hear his testimony, did you?

A. No, I don't believe so.

Q. As I remember it, he said that one of the things that troubled him to some extent, at least, was the passing of some blood; my recollection is that he said that that was particularly when he was constipated. Assume that that [fol. 288] was the way he put it, would there be any connection between that and this injury that you have testified about?

A. Well, at the time of the first examination he complained of frequency of urination. He didn't complain to me of passing any blood. If you can just tell me what he stated this was——

Q. My recollection of it is that the testimony was to the effect that some little time after the accident that he passed blood from the rectum and that he was suffering from constipation and that this condition continued, as I remember, for about a couple of months and then that the reverse condition, that he would suffer from the reverse condition so that he could not control his movements.

A. Well, any injury to the lower bowel would certainly manifest itself at the time of the accident or during the first week. If a period of time had elapsed, say two or three or four weeks, then this thing may have been due to other

extraneous causes. For instance, hemorrhoids are perfectly natural causes.

Re-cross-examination.

By Mr. Davis:

Q. When you examined him, did you find him suffering from hemorrhoids?

A. No.

Q. Now, if he was not suffering from hemorrhoids and had this condition, what else would cause it, other than the accident?

A. He may have had hemorrhoids at that time.

Q. There was no evidence that he did have.

[fol. 289] A. Well, there wasn't any evidence that he didn't have.

Q. How?

A. I say he may have had hemorrhoids at that time and not at the time of the examination.

Q. You could see if he had ever had them?

A. No, I didn't see any evidence at all.

Q. And if this condition took place some three weeks afterwards and he had this difficulty, can you attribute it to anything but hemorrhoids?

A. Well, yes, you could attribute it to some infection of the bowels. As a matter of fact, that is the usual cause of conditions of that kind.

Q. An infection of the bowel?

A. An infection of the bowel and colitis.

Q. Dr. Kuth, does actual pain, that is actual physical pain, as a general rule, cause loss of weight if it is serious?

A. I think if it is excessive and interferes with the other functions of the body it could be expected to cause loss of weight.

Q. It would produce that, wouldn't it?

A. It could. That is, if it interferes with sleep and interferes with appetite.

Q. Yes.

A. It would naturally interfere with the body weight.

Redirect examination.

By Mr. Boyle:

Q. You did not find Mr. Moquin under weight at all, did you, Doctor?

A. No, he carried very good weight.

[fol. 290] Recross-examination.

By Mr. Davis:

Q. What do you mean by under weight?

A. I mean a man that doesn't weigh enough, a man or woman that doesn't weigh enough.

Q. Do you know what he weighed before he was hurt?

A. No. I was given to understand that he weighed more than he weighed at the time I weighed him.

Q. Would you say that a man who normally weighed 212 pounds and now weighed 182 pounds, 30 pounds less, was normal in weight, Dr. Kuth?

A. Well, I would say 182 pounds for a man five feet, six inches high is certainly a good upper limit weight.

Q. I didn't ask you that. If his normal weight before he was hurt was 212, no matter if he was five feet high or ten feet high, if his normal weight was 212 pounds, would you say when he had lost 30 pounds that he had his normal weight?

A. Well, you are putting his normal weight.

Q. Yes.

A. What his normal weight is I don't know.

Q. I am asking you to assume it was 212 pounds?

A. I would say that he had lost the difference.

Q. Well, I say, then you would not say that he was up to his normal weight?

A. I would say that he has got a very good normal weight at this time for a man of his height.

Q. I grant you that, but if he was a heavier man normally [fol. 291] and weighed 212 pounds at the time of his injury and had for many months before, and that was his normal weight, 212 pounds, and he lost 30 pounds, you would say that he was not up to his normal weight, wouldn't you?

A. No, I would say that he wasn't up to the weight that he had at that time.

Q. I see.

A. Now, he may have weighed differently before.

Q. All right. Now, if he had lost that 30 pounds, I will ask you if actual, extreme pain and loss of sleep would be one of the producing causes of the loss of weight?

A. I answered that question before.

Q. That is correct, isn't it?

A. That is correct, yes.

Dr. S. H. Boyer, called on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Where do you live, Doctor?
A. Duluth.
Q. How long have you lived in Duluth?
A. Thirty-eight years.
Q. What is your profession?
A. Practice of medicine.
Q. How long have you been engaged in that profession?
A. Thirty-nine years.
[fol. 292] Q. Thirty-eight years in Duluth and one year some other place?
A. About that, yes, sir.
Q. Did you prepare yourself by going to some medical school?
A. Yes, sir.
Q. What school?
A. Medical department of the University of Pennsylvania?
Q. When did you finish at the University of Pennsylvania?
A. The spring of 1890.
Q. Did you start practicing medicine when you completed your study?
A. Yes, sir.
Q. Have you been practicing ever since?
A. Yes, sir.
Q. What has been the general nature of your practice?
A. My work was general work for about 20 years. Since then it has been in the field of internal medicine.
Q. Did you join with Dr. Kuth in making an examination of the plaintiff in this case last October?
A. Yes, sir.
Q. By the way, you have just been elected president of the State Medical Association, haven't you, Doctor?
A. Yes.
Q. When was it that you made the first examination of the plaintiff in this case, Doctor?

[fol. 293] A. In October, 1928, October 22nd.

Q. Was that at the same time that Mr. Moquin was being examined by Dr. Kuth?

A. Yes, sir.

Q. Tell us what examination you made of Mr. Moquin at that time.

A. The examination was a joint examination made by Dr. Kuth and myself and consisted of a general examination from head to foot and in learning from him the nature of his injuries, if any, sicknesses, if any, and correlating the findings, head, neck, chest, back, arms, abdomen, extremities, skin, as nearly as we could all the organs of the body, bones and joints.

Q. What did you find upon that examination?

A. I will confine myself, I think, unless required to do otherwise, to the complaints submitted at the time. He complained of pain in each heel, especially upon walking, explaining that this pain extended up the calves of his legs, the backs of his thighs and about his buttock in the region of the lowest part or the end of the backbone. He said he had some soreness and pain in both ankles, said that he had a thumping or buzzing feeling in the outer side of the right hand and forearm, stating that that extended from about three inches above the elbow on the outer side of the arm down to the end of the little finger, said that he had not had control of his bowels, urinated frequently, complained of pain in the lower part of his back, away down low. I think that is the sum and substance of the things that he complained of.

[fol. 294] Q. Did you make a physical examination at that time?

A. Yes, sir.

Q. What did you find upon that examination?

A. So far as the arm is concerned, the right forearm and hand, there was nothing to be found, apart from normal conditions. In other words, the symptoms he complained of in the arm were things that he himself could feel, but which nobody could observe, as a person with a headache, no one can see or feel the headache except the person who has it. I could not find the pain in his arm or the numbness in his fingers. He said he had it. I could find no abnormal condition in the hand and forearm. In the left

ankle and leg there was nothing apparently abnormal. In the right ankle there was some limitation of movement in the side directions as well as downward and up. The downward limitation was very little, if any. The upward movement was diminished perhaps as much as eight, ten or eleven degrees, I should say. He perhaps could not raise his foot more than at a right angle to the shaft the length of his leg. He complained of aches, pains in the lower end of his back. Pain, again that was a subjective matter. There was nothing that I could discover that showed the presence or absence of such pain.

Q. Did you make another examination after that, Doctor?

A. Made another examination this morning, yes, sir.

Q. That was at the same time Mr. Moquin was being [fol. 295] examined by Dr. Schnell and Dr. Kuth?

A. Yes, sir, it was a joint examination.

Q. Here in Brainerd?

A. Yes, sir.

Q. Tell us what examination you made this morning and what you found.

A. That was showing the same thing and the same findings, excepting he didn't now complain of so much numbness in the hand or forearm as before, now seeming to limit it to the little finger. There was no departure from normal conditions in the forearm and hand, no departure from normal conditions in the left ankle, a limitation in the upward movement of the right ankle joint, such as I have already described, and perhaps some limitation in the lateral movement, the side to side movement, as I showed you.

Q. I would like to ask you first your opinion about that right leg, how is the injury to that right leg going to affect Mr. Moquin, so far as work is concerned?

A. Well, now, I understand, if I may be permitted so to state, that Mr. Moquin had a fracture, a break of the lower end of the shin bone, beginning a little distance above the right ankle joint and that is confirmed by the X-ray pictures that I saw. I think we have a permanent injury in the ankle joint. I do not believe that it is going to keep him from doing work of an ordinary character.

Q. What about the left leg? Is there anything in the left leg or any injury that he complains of there that you [fol. 296] think will keep Mr. Moquin from doing work of an ordinary character?

A. No, sir.

Q. And what about the complaint that he has in the right arm, do you think there is anything about that that will keep Mr. Moquin from doing ordinary work?

A. No, sir.

Q. And did you this morning again examine his back?

A. Yes, sir.

Q. Is there anything about the injury to that back that is permanent or should keep Mr. Moquin from doing ordinary work?

A. There is nothing to indicate so far as physical examination is concerned that there has been any serious injury to his back or any part thereof. There is nothing to indicate that there is any limitation of motion in any part of his back.

Q. Do you think Mr. Moquin is able to do ordinary work at the present time, or if not, how long will it be before he will be able to do ordinary work?

A. I think there is considerable that Mr. Moquin could do at the present time. I do not mean to say that he would be free from distress in his right leg and ankle. I think he would have some distress. I think he has some distress now when he uses it, but I think that that will improve as time goes on, as is characteristic of injuries. We don't stay hurt forever.

Q. Do you think that the distress will disappear so that [fol. 297] he can do work without pain?

A. Yes, I think that. I think that he may have some little aching from time to time. I think very likely if he went to work hard all day that perhaps his ankle would ache at night, but as time goes on I think that that will be less troublesome than it would be at the present time.

Cross-examination.

By Mr. Davis:

Q. I understood you to testify he has a permanent injury in the ankle joint?

A. Well, the injury is to the bone. It extends to the joint and changes the surface of it a little and in that sense I might say that there is an injury involving the ankle joint.

Q. I may have misunderstood you, but I wrote down that you stated there was a permanent injury in the ankle joint of the right foot.

A. Well, the explanation I gave is in explanation of that statement.

Q. Dr. Boyer, a man falling from the height of the top of a boxcar, landing on both feet and weighing 212 pounds, you would naturally expect quite an injury to his feet?

A. Yes, sir.

Q. And falling back on the frozen ice or the rails of the track on to the small of his back would be very likely to injure his back there, wouldn't it?

A. I think that he might, yes.

Q. And let us assume that immediately after the accident, while he was lying on the ground, he complained of suffering pains in his back, you would be fair enough to [fol. 298] attribute that to his fall, wouldn't you?

A. Yes, I think that would be due to his fall.

Q. And assuming that he has had that pain and has complained of it ever since and that he is telling the truth, Dr. Boyer, you would still have to say that the only known cause would be the fall which had caused that pain, wouldn't you, Doctor?

A. Why, yes, if the man says he has pain and is telling the truth.

Q. Yes.

A. Why, of course——

Q. Yes.

Mr. Boyle: What was that, Doctor?

A. That is all I have got to say.

Mr. Davis:

Q. Are you through, Doctor?

A. Yes.

Q. There was an interruption and I thought you had something you wanted to say. You had finished your answer?

A. Yes.

Q. Now, Dr. Boyer, assuming that he fell and injured his right arm at that time, or that he complained of and had numbness in his right arm, and assume that he is telling the truth about it, taking that for the hypothetical question, you would naturally say that the fall would be the producing cause of that condition, wouldn't you?

A. Yes.

Q. And if it continued from that time up to the present [fol. 299] time and assuming that it was present, you would say that it was sort of a serious injury which produced that continuing condition for fifteen months, wouldn't you?

A. Not in the absence of other confirmatory signs.

Q. Well, assuming that it is there, that it is a fact he had that numbness or paralysis of his fingers?

A. Yes, but I can not assume that.

Q. But I am going to ask you to, Doctor, for this hypothetical question.

A. All right.

Q. I think you will. I know you want to be fair. I will ask you to assume that, Dr. Boyer. Assume that he has had this numbness, as he has testified to, since the accident and that he complained of it to you, I believe, when you first examined him in October, didn't he?

A. Yes.

Q. And assume that that was true, that he was telling the truth at that time, and assuming that he had what he claimed this morning when you examined him and that he has had that trouble ever since the accident, would you not then state that the injury which he received to his arm is the only known producing cause that would produce that condition, so far as you can tell?

A. Assuming all those things to be true, yes.

J. B. Kelly, called on behalf of defendant, duly sworn, testified as follows:

[fol. 300] Direct examination.

By Mr. Boyle:

Q. Where do you live?

A. Minneapolis.

Q. What is your business or occupation?

A. General roadmaster of the Soo Line and the South Shore.

Q. How long have you held that position?

A. Four years.

Q. Is this route through Cloverton a part of your territory?

A. Yes.

Q. So that you held that position at the time Mr. Moquin was injured?

A. Yes.

Q. How long have you been in the railroad business?

A. Twenty-eight years.

Q. And during that time what different positions have you held on the railroad?

A. I have been with the Soo Line twenty years and during that time four years as general roadmaster, six years as assistant general roadmaster and ten years as roadmaster. Before that time I was on the Iowa Central as roadmaster about seven years, and before that I was section foreman, laborer and extra gang foreman for a year.

Q. On the same railroad?

A. On the same railroad, yes, on the Iowa Central, Minneapolis & St. Louis.

Q. Mr. Kelly, you have had experience in looking after cars that have been derailed and have studied conditions [fol. 301] under which cars will derail and that sort of thing?

A. Yes, that has been part of my work.

Q. That comes right in the line of your employment, does it?

A. Yes.

Q. Have you had in that connection experience with snow on railroad tracks?

A. Yes.

Q. What has been your experience, Mr. Kelly, and what is the fact about whether snow in itself will cause a car to be derailed?

A. My experience is that snow will derail a car, ordinary snow.

Q. Will you explain for us, please, just what happens, just how that happens?

A. Well, there are many ways, of course, in which snow would involve an accident. In one case we might say, that in backing a car through snow where the snow was a little deeper on one side than the other the movement of the wheel would compress the snow and the height on one side would tend to slew the truck, which would cause the derailment. That is one of the many ways in which a derailment may occur through snow.

Q. And when you have a condition of snow on the track, snow that is good for making snow balls in mild weather where there is a thaw, what particular condition do you have there, so far as the derailing of a car is concerned?

A. Well, that condition will aggravate the situation, too, [fol. 302] probably cause the derailment a little sooner than ordinary snow would.

Q. Why is that?

A. Because the snow is compressed or packs more readily and assists the wheel off the track sooner or up above the rail sooner.

Q. Just how does the snow act as the car goes into the snow bank?

A. The movement of the wheel, of course, packs the snow and in that movement the natural tendency is for the snow to work under the wheel and lift the wheel.

Q. And that is likely to cause a derailment, is it?

A. Yes.

Q. Now, are you familiar with the flange that is on the wheel of a railroad car?

A. Yes.

Q. Do you know the length of the flange? Those are standard, are they?

A. Yes.

Q. What is the length of the flange?

A. The depth of the flange, rather, is normally from one inch to one and one-eighth inch. There is a tolerance there in the manufacture that permits not less than one inch or more than one and one-eighth inches.

Q. I am assuming that everyone in the court room knows what I mean by a flange, but in order to have the record perfectly clear, will you tell us what is meant by the flange of the wheel?

A. The flange of the wheel is the projection below the [fol. 303] tread of the wheel on the inside which contacts

the gauge of the rail, keeping the wheel in line on the track, on the rails.

Q. Mr. Kelly, will you explain what are the duties of a section crew so far as the removal of snow is concerned?

A. The section foreman and his men are required to remove the snow from the flange-way of crossings, public or highway crossings.

Mr. Davis:

Q. What ways of the public crossings?

A. The flange ways. That is the margin or flange-ways between the rail and the plank in which the flange of the wheel moves in passing, and also through the switches, guard rails in switches and around the frogs. Those points there are taken care of by the section foreman.

Q. What about snow on other places along the track? How is that taken care of?

A. That is taken care of by machinery. That is, flangers and steam power and so forth, various equipment that is used for that.

Q. Now, Mr. Kelly, assuming there was a condition along the track on which there was ice covering the ground, would that necessarily require any action by a section crew or anyone connected with the railway company outside of flanging movements? What I am trying to get at—my question may not be very clear—what I am trying to get at is whether or not a condition of ice along the track calls for any attention on the part of the section crew?

[fol. 304] A. Yes.

Q. When?

A. When the ice gets up around the head of the rail where it will interfere with the flange of the wheel.

Q. How high does the ice have to get before it would call for attention from the section crew?

A. The section crew would pay no regard to the ice unless it would get up to about an inch and three-quarters of the top of the head of the rail.

Q. And what then would be done about it?

A. In order to be prepared and be safe it would be natural to do some ice work there in preparation for any further rise in the ice. The ice may come up much more than that without any interference with safety, but it is usual and policy to start work on ice when it gets that high.

Q. And how high will the ice come up without interference with safety, as you call it?

A. Well, it may come up to a half inch; may come up to a half inch.

Mr. Fryberger:

Q. Half inch from the top of the rail?

A. From the top of the rail, yes.

Mr. Boyle:

Q. Have you also had a good deal of experience, Mr. Kelly, in operating engines or being with engines operated through snow and over icy conditions of tracks?

A. Yes, in supervision of the snow plow outfits and such as that. The locomotive engineer handles the engine, but [fol. 305] in supervision of an outfit of that kind I have had a lot of experince in that.

Q. I think I called your attention to this chart last night, was it, or the night before, Mr. Kelly?

A. Yes.

Q. And you may assume that this is the type of an engine that was on the train on which Mr. Moquin was injured; then assuming you had a condition along the house track there at Cloverton—you know that Cloverton station there, do you?

A. I am generally acquainted with it, yes.

Q. If you had snow along that track anywhere from ten to fifteen or eighteen or a couple of feet deep, along the house track, would there be any trouble removing that snow in a flanging movement if the crew would head the engine into the snow and go through head-on?

A. No, sir, none whatever.

Q. And assuming that there was ice, just the ordinary ice which you find along the track in the winter time—do you as a general rule find ice along the track in the winter time?

A. To a slight extent, yes.

Q. Just what do you mean by that?

A. Well, there is usually—in any accumulation of thawing and freezing and so forth there is always some evidence of ice around the track, but not to a great extent. The track usually clears up among the first opening or with the first clearance of the ground. You will find the track will

clear itself out. The suction of trains will take the snow out and as a rule, unless there is a slight storm or something of that kind, your track is pretty much free of ice. [fol. 306] As a general rule, unless it is in case of springs or something like that, you don't have to contend with ice or pay very much regard to it.

Q. As you go over the road with your flangers or snow plow is there on the bottom of the roadbed a covering of ice and snow during the winter in this part of the country?

A. To some extent, yes.

Q. And is that something similar to what you would have if you put a snow plow over a street; you would not necessarily clear it off right down to the bed, is what I mean?

A. Oh, no. No, the snow equipment just projects down an inch and three-quarters below the rail. That is as far down as it goes.

Q. And is that as far down as you figure it is necessary to have a clearance?

A. That is all that is necessary.

Q. So then, if you had ice up that high—what did you say it was, an inch and a quarter?

A. An inch and three-quarters.

Q. An inch and three-quarters from the top of the rail, and then snow on top of that, would there be any trouble about cleaning out that house track at Cloverton with this engine that has been called to your attention which is shown on Defendant's Exhibit 4?

A. No, no trouble.

Mr. Boyle: I would like to ask Mr. Roe a question.

[fol. 307] Mr. Davis: Surely.

(Witness temporarily excused.)

JOHN F. ROE, re-called on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Mr. Roe, to complete the record here, was your engine equipped with flangers the day that Mr. Moquin was injured?

A. Yes, sir.

Q. And the flangers were in good working order, were they, that equipment was in good condition?

A. Yes, sir.

J. B. KELLY, a witness called on behalf of the defendant, resumed the stand for further direct examination and testified as follows:

Direct examination.

By Mr. Boyle:

Q. Well, now, assuming, Mr. Kelly, an extreme case, even if you would have ice that would extend up over the rail and you had snow on top of ice of that kind, what would be the effect of running this engine on Defendant's Exhibit 4 through the house track under conditions of that kind?

Mr. Fryberger: Head-on.

Mr. Boyle:

Q. Head-on, yes.

[fol. 308] A. With ice over the rail you might expect—you would expect to get this pony truck, that is, the lead wheels of the engine, it would be likely that that pair of wheels would leave the track, but that would be all the consequence with ice just over the rail because the drivers have weight enough to cut down through the ice and they usually do.

Q. What is the difference—well, let me put it this way: What will an ordinary box car weigh?

A. An ordinary box car will weigh an average of around twenty tons.

Q. And what does an engine like that weigh?

A. The F-12 class, with the engine equipped for the road, 175, about 175 tons.

Mr. Fryberger: 175 tons?

A. Yes. That is complete, engines, tank and all.

Mr. Boyle:

Q. Then in going head-on through that house track, even though the ice were on top of the tracks, as I understand

it, there would be no danger of a derailment of the engine, with the exception perhaps of the pony truck, is that right?

A. That is usually what happens where you contact ice over the rail with this power.

Mr. Boyle: I think that is all.

Cross-examination.

By Mr. Davis:

Q. What is the weight of the front part of the engine, do you know?

A. That would be this engine truck or the pony truck?

Q. Yes?

[fol. 309] A. Just that pair of wheels there?

Q. Yes?

A. That truck on this power is about thirteen tons.

Q. What is the width from the front of the engine to the gang-way?

A. That would be the weight on drivers. Why, drivers average—that would be about 98 tons on drivers, on those drivers. The weight on drivers varies some.

Q. Yes. What is the weight of a tie?

A. We have ties, of course, of various weights. We have a scale on that. Ties run from 125 pounds to 200.

Q. Yes. When they are creosoted they weigh more?

A. Yes.

Q. About how much more?

A. Well, now, creosoting these ties, the uniform size ties, if I am not mistaken about that, adds but a very few pounds.

Q. Where they are creosoted?

A. Yes.

Q. Aren't they on an average of fifty pounds heavier when they are creosoted?

A. When they are creosoted?

Q. Yes?

A. No.

Q. When they are creosoted isn't there ten per cent increase in the weight of the tie?

A. No.

Q. You are sure of that?

[fol. 310] A. Yes.

Q. And you say that the average would weigh from what, 175 to 200 pounds?

A. No, we have ties that weight 125, standard ties 125 and in various weights up to 200.

Q. Do you know what kind of ties were in this car?

A. The ties being used in that territory were zinc treated ties and they are mixed; they are birch and maple.

Q. Well, they would weigh about what, on the average?

A. I think those ties would weigh about 200 pounds.

Q. Now, would you state to the jury that ice over the top of the rails is not one of the frequent causes of derailment of engines and of even wrecking passenger trains?

A. No.

Q. It is a fact that they do derail?

A. Yes.

Q. And have wrecks with ice over the top of the rail?

A. Yes.

Q. And when the pony trucks go off the engine goes off and the passenger coaches go off?

A. Sometimes.

Q. And ice concededly over the top of the rails is a very dangerous condition?

A. A condition you must watch.

Q. Yes. And you would say for the railroad company to allow ice to be over the top of the rails would be a very [fol. 311] careless thing and then require the train to go on it?

A. Yes.

Q. Or to require train men to use that kind of a track?

A. Yes.

Q. And you know from your own experience, of course, that the greater the extent of the ice the more the danger, that is, the higher it is over the rail?

A. Yes.

Q. And where it is covered over with snow and extends over the rails it would be an extremely dangerous thing, wouldn't it? Isn't that true?

A. Oh, yes, with ice over the rails it is.

Q. The flanges of the wheel might cut through the snow and when it hit the ice it would derail?

A. In some cases.

Q. You know that it is the duty, do you not, of the section men at all times to have charge of the repairs on their

respective sections and to watch in order to secure the safety of their tracks at all times?

A. Yes.

Q. That is a duty that devolves on the section men?

A. Yes.

Q. That is to protect the railroad train crews who might have occasion to use those tracks?

A. Yes.

Q. And you would say, wouldn't you, that if there were ice up to, say, an inch of the top of the rails that it might [fol. 312] be dangerous and might derail the engine or the car?

A. No.

Q. The flange would cut through the ice?

A. It would, yes.

Q. It would cut through ice, but it would not cut through dry snow or soft snow, would it?

A. Yes.

Q. It would cut through that much easier, wouldn't it?

A. Yes.

Q. And they would be more likely to derail with hard ice than with soft snow or dry snow?

A. Yes.

Q. Much more?

A. Yes.

Q. Now, from your own experience, you have frequently seen cars go through snow from eight to ten inches high without being derailed, haven't you?

A. That is so every day in the winter.

Q. Yes. And it is done through dry snow and soft snow and they don't derail, as a general rule?

A. Don't derail.

Q. Your general experience of that kind has been that where you back a car through dry snow of only eight or ten inches it doesn't derail the car, does it?

A. Oh, sure.

Q. I see. But it is unusual, though?

A. It is a chance.

Q. I say, is it unusual?

[fol. 313] A. No, that happens frequently.

Q. When has it happened last in your knowledge?

A. In my knowledge, last winter.

Q. Where?

A. All over the system in snow storms.

Q. Well, where?

A. Well, on the line below Marshfield.

Q. How deep was the drift?

A. The highest ran from—in this case, why, the drifts, of course, ran from ten inches to five or six feet.

Q. Yes, but I am speaking now of a drift that is no more than eight or ten inches high?

A. And backing the car in?

Q. Yes, there isn't as much danger as if the drift was higher, the higher the drift the more the danger, isn't that true?

A. Well, after you get a drift ten or twelve inches, after you get up a certain distance on the wheel it doesn't make so much difference.

Q. No. Now, would you say eight or ten inches; would you put it that low?

A. Yes, I would say eight or ten inches.

Q. And do you mean to tell the jury now that, in your experience, it is a common occurrence when cars are backed through drifts of only eight or ten inches that they usually derail?

A. Yes.

Q. They usually derail?

A. Oh, yes.

Q. You would say nine times out of ten they would de-
[fol. 314] rail, would you?

A. Well, you are still taking chances. You might go through five times out of ten.

Q. And you might go through ten times out of ten?

A. And might not, yes, but——

Q. You know they have done it, don't you?

Mr. Boyle: Just a minute. Counsel breaks in on him all the time.

Mr. Davis: No, he has answered the question.

Q. You know that has been done, don't you?

A. That has been done.

Q. Done on your system, you know that?

A. Oh, yes.

Q. Done with your knowledge?

A. Yes.

Q. Done under your observation?

A. Expecting to get off the track.
Q. I say done under your observation?
A. Yes.
Q. Frequently, repeatedly, isn't that true?
A. It is being done, yes.
Q. Well, I say, done with your knowledge and under your observation, isn't that true?
A. Well, not shoving a car with my knowledge and observation.
Q. You have never seen a car shoved through a drift?
A. Oh, yes. Yes, I have.
Q. Numerous times, haven't you?
A. Sometimes.
Q. Yes. You have seen them go through without derail-
[fol. 315] ing, too, haven't you?
A. Yes.
Q. And numerous times, haven't you?
A. Quite a few times.
Q. Yes, have been present taking part in the operation?
A. Not in the operation.
Q. No. But you observed it?
A. I have observed it, yes.
Q. Yes, sir. Now, would you say to the jury that when you have observed this that you have disciplined those men, would you tell the jury that?
A. No, haven't been the cause of it.
Q. How?
A. No, I haven't.
Q. You haven't disciplined them when you have seen them do that, isn't that true, Mr. Kelly?
A. Not that I remember of.

L. E. Loomis, a witness recalled on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Boyle:

Q. There were one or two figures I wanted to get from you. I wanted to get the distance between the journal box and the ground of a freight train?

A. From the top of a tie to the bottom of the arch bar was fifteen and one-eighth inches when the car was setting on a sixty pound rail.

Mr. Boyle: Mr. Kelly, do you know what the size of the [fol. 316] rail is there at Cloverton on the house track?

Mr. Kelly: Sixty pound rail.

Mr. Boyle:

Q. Did you give us the figure of fifteen and a half inches?

A. Fifteen and one-eighth inches.

Q. Fifteen and one-eighth inches from the top of the tie to what place?

A. To the bottom of the arch plate underneath the journal boxing.

Q. Just what is that arch plate?

A. Well, that is a plate that supports the bottom of the journal.

Q. How thick is that plate?

A. Well, it is a double plate. I didn't measure that, but it appeared to be about one-half inch for each plate, making about one inch.

Q. Well, the journal box sets right on that?

A. Right on top of that plate and there is a couple of bolts run up through the plate and along on top of the truss work for the truck.

Adjourned to 9:00 o'clock A. M. of Wednesday, May 22nd, 1929.

Court reconvened at 9:30 o'clock A. M., Wednesday, May 22nd, 1929.

Mr. Davis: If it please the court, at this time the plaintiff asks leave of the court to re-open plaintiff's case for one purpose, namely, to introduce evidence which possibly or probably might be in rebuttal, but in an abundance of caution and to protect the plaintiff's rights, we make the [fol. 317] motion at this time. I would like to have the record show, your Honor, that on Tuesday evening before or just as court adjourned counsel for plaintiff notified counsel for the defendant and called to the attention of the court the fact that three witnesses had just been obtained

on the afternoon of Tuesday, who would testify as to the condition of the tracks at Cloverton. At the same time, counsel for plaintiff stated that a witness by the name of Jones had agreed to be here. I would like to have the record show, for the information of the court, that a week ago Monday Mr. Jones was phoned——.

Mr. Fryberger: I do not think, may it please the court, that this statement should be made in open court, anything about Mr. Jones or anything of the kind. If the witness is here and he makes his motion I suppose the court will pass on it. We certainly object to statements.

Mr. Davis: Well, I wanted to state the reason so the court would know what diligence we had used and why we didn't have these witnesses before. I might state this, I think counsel will not object to it, that Mr. Jones had agreed to be here as a witness, but did not come, and that yesterday morning Mr. Lush, who was in our employ as an investigator, drove to Cloverton and there interrogated two or three of the farmers living there and learned from them that they knew of the condition of the track and had been present shortly after the derailment, and also one of them I think present at the derailment, and they are now present in court, and I would like the record also to show that last [fol. 318] evening we offered to give to Mr. Fryberger, counsel for the defendant, the names of the witnesses and their addresses. I would ask the court, in the interests of justice and in order to present to the jury all the facts which are available, to permit us to re-open for that one purpose. I might state to the court that there is also another reason why I think the court should exercise its judgment and its discretion in this matter and that is because of the document I handed the court, which would not lead us to believe that it would be seriously contested that ice was on the track.

Mr. Fryberger: I wish to object to the granting of this motion on the ground that there has no showing been made to justify the court in exercising discretion. The statute provides that the plaintiff shall put in his case and when he has rested then the defendant shall put in his case and then the plaintiff may rebut any new evidence that comes in on the answer. Now, if this can be done in this way there is no reason why the trial should not be reversed any time,

anywhere, no showing made of any kind, and we object to it on the ground that it is a matter that the court really has no discretion in.

The Court: The motion is granted, and that being evidence which should properly, in the orderly course of the trial, have been introduced before the plaintiff rested, if counsel for defendant are surprised in any manner and need additional time to rebut any such evidence, such time will be granted. The plaintiff specifically referred to this [fol. 319] point of ice on the track and I take it that the defendant, defendant's counsel, anticipated they would have to meet that issue. If those witnesses had testified on Tuesday on the case in chief counsel would have had more time to combat or dispute their evidence than they now have, so that in granting this motion it is with the understanding that if counsel for the defendant want the same amount of time to rebut that evidence that they would have had had it been introduced Tuesday, they may have it.

Mr. Fryberger: We take an exception, your Honor.

For the Plaintiff

James L. Brewer, called on behalf of plaintiff, duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Where do you live?

A. I live in Cloverton, Minnesota.

Q. How old are you?

A. I am thirty-eight years old.

Q. Are you married or single?

A. I have a wife and eight children.

Q. What work do you do at Cloverton?

A. I work at the hoop making trade in the summer time and log and load pulpwood in the winter time.

Q. You have lived at Cloverton how many years?

[fol. 320] A. I have lived right in Cloverton three years.

Q. Before that where did you live?

A. South of Cloverton two miles, six years.

Q. Before that where did you live?

A. Rockford, Iowa.

Q. What did you do there?

A. I worked at the Rockford Brick & Tile.

Q. How long did you work there?

A. Three years.

Q. Before that where did you work?

A. I lived in Illinois before that, worked on farms at monthly labor.

Q. Were you born on a farm?

A. Yes, sir.

Q. What state?

A. Henderson county, Illinois.

Q. In the winter of 1928 where were you living?

A. I was living in Cloverton.

Q. What were you doing?

A. I was logging part of the time and part of the time I was loading pulpwood out of the wood yard.

Q. By loading pulpwood what do you mean?

A. Pulpwood is this here timber that they buy and ship into the mills to make paper out of and it is loaded on gondolas, box cars and flat cars to be shipped out.

Q. Were you working in company with anybody else?

A. Yes, sir, Mr.——

Q. Did you live right in the town or outside of the town?

[fol. 321] A. I lived right in the town.

Q. Were you in town at the time the car was derailed?

A. I was in the timber at the time the car was derailed in the day time.

Q. Do you recollect in the latter part of February, 1928, of a car being derailed?

A. Yes, sir.

Q. Do you know or did you later learn what was in that car?

A. I learned the next morning after this car was derailed that it was loaded with railroad ties.

Q. Did you come into town that afternoon or evening?

A. I came into town out of the woods about five o'clock that evening.

Q. In hauling pulpwood would you go over the tracks of the Soo Line?

A. Yes, sir.

Q. Do you know whether there was any roadway that had been made that winter over the tracks of the Soo Line?

A. Yes, sir.

Q. What had it been made by?

A. There was a road-way made right at what we call the old Golmo warehouse and this was made when we were loading cars there, driving back and forth to haul the empties down to the jammer and haul the loads away with the teams across the track and also the farmers got to using it, too, hauling back and forth loads.

Q. How far was that, would you say, from the main [fol. 322] street crossing?

A. Just about, as near as I could tell you, 200 feet.

Q. Did you see where this car was derailed that afternoon?

A. Yes, sir.

Q. What time?

A. About five o'clock in the evening.

Q. How did you happen to notice it?

A. I came in from the woods from the north, as we call it, from the east, along the Soo line, on the street over there in town with a load of timber and my partner and I, we happened to notice this car setting over there off the track and we were talking about it, so when we got down to the highway, why, my partner gets off the sled and goes on home to do his chores and I drove over into the wood yard to unload this load of wood. After I got across the track I got off the sled and went over, curiosity, to see what had happened.

Q. Did you see where the car of ties had left the track?

A. Yes, sir.

Q. Where had it left the track with respect to where these sleds had been making the road over to the track hauling pulpwood?

A. Yes, sir, when it came down from the west to where the sleds had been traveling across the track and the teams, it just simply looked like it had raised right up and took [fol. 323] right off into the snow, struck that ice.

Q. I will ask you this, when you were there and saw where this car was derailed, which way did the car go if you were going, say, east, to the left or to the right of the track?

A. The car went to the left of the track.

Q. How did it set on the track, that car you saw?

A. That car I saw that was derailed didn't set on the track.

Q. Well, I mean how did it angle away from the track?

A. Well, sir, it turned out from the track just as though to make what you would call a Y.

Q. Do you know whether there was any ice on those rails?

A. Yes, sir.

Q. Was there or not?

A. There was ice on those rails.

Q. And was there any snow over that ice?

A. Yes, sir.

Q. Do you know, taking this place where they crossed over with these pulp sleds and such things as that, whether or not that dragged snow or ice over the tracks? I mean this road-way. You said there was a road-way across the railroad track?

A. Yes, sir.

Q. We call this direction west, although it may be south or north by the compass, but we are taking towards Dresser Junction as west?

A. Yes, sir.

Q. And east towards Superior. Now, from the west could you see where this car had come through any snow?

[fol. 324] A. Yes, sir.

Q. And about how deep was that drift?

A. That drift on the one side of the track, the left hand side of the track, where it blew in there, was about one foot deep and about eight inches on the other side.

Q. Had the car gone through that snow, could you see the tracks?

A. Yes, sir, the car had gone through that snow.

Q. Then when it hit this roadway, as you say, did it hit any ice?

A. Yes, sir.

Q. And how thick was that ice over the rail?

A. The ice was over both rails from one inch to two inches deep.

Q. Did you see where the car had cut through the ice, the flange of the wheel?

A. The flange of the wheels cut through the ice where it went off from the tracks over the rails.

Q. You had lived there all that winter?

A. Yes, sir.

Q. I will ask you if in living there and working there you had occasion to move cars on that track to spot them to load pulp?

A. Most certainly did.

Q. How long before you saw this car derailed on the house track was it that you had occasion to move any cars on that house track?

A. Somewhere in the neighborhood of four or five days before that we were loading wood there.

Q. When you were doing that did you have to move a car over this road or along this roadway that crossed the [fol. 325] railroad track?

A. Yes, sir.

Q. You may state whether there was ice over the rails of that track four or five days before this accident?

A. Yes, sir, there was.

Q. How did you move that car then?

A. We had four horses onto it and we used picaroons and crowbars and one of the boys went over to the depot and got the pinchbar to help us start it.

Q. Then what did you do in moving the cars?

A. And after we got it started, in other words, we dragged it right bodily over this ice.

Q. When it went over that ice what happened?

A. The wheels was all slipping when it went over the ice.

Q. In other words, it slipped over the ice instead of going over the rails.

A. Yes, sir, it slipped over the ice instead of rolling.

Q. State whether you know the section foreman—Mr. Raasch, will you please stand up—the gentleman standing there, have you ever seen him?

A. I have seen him, yes, sir.

Q. I will ask you if you ever had a talk with him about the condition of this track before this car was derailed?

A. Yes, sir, I asked him when we was loading wood there——

Mr. Fryberger: He just asked you if you had had a talk. [fol. 326] Mr. Davis: What was that talk?

Mr. Fryberger: Object to that as hearsay and incompetent.

Mr. Davis: Then, I will ask the privilege of calling Mr. Raasch for one question under cross-examination, to lay the foundation for impeachment. I think it is, in fact, material anyway, as notice to the company. Notice to the foreman of this section crew is notice to the defendant company.

Mr. Fryberger: Oh, there can't be anything of that kind. Any admission he would make would not bind the company.

Mr. Davis: Why, it is notice to the company of the condition of the track.

Mr. Fryberger: His duties came in an entirely different way and from an entirely different source. His admissions one way or the other could not have the slightest effect on the obligations of the company. The obligations of the company do not depend on notice, may it please the court. Their liability depends on conditions, not on notice.

Mr. Davis: Well, but knowledge goes to the question of due care and the length of time it has been there goes to the question of due care.

Mr. Fryberger: If the road wasn't in the shape it should have been in, it don't require any notice from anyone. Notice don't add to nor detract from the duty of the company. They should keep their roads in proper repair as the law calls for.

The Court: Objection sustained.

Mr. Davis: Exception.

[fol. 327] Q. You saw the foreman there at different times when this track was in that condition?

A. Yes, sir.

Q. Did you have occasion to talk to him about the condition of the track?

A. Yes, sir.

Q. How long before this derailment, to your knowledge, was this track in that condition, covered with ice?

A. About ten days.

Q. When you got there at five o'clock that afternoon, you may state whether there was any snow shoveled away from that track.

A. No, sir, I didn't see any snow shoveled away.

Q. And was the ice over the rails of that track?

A. Yes, sir.

Q. Where the car was derailed?

A. Yes, sir.
Q. Were you there the next morning?
A. I was down by there the next morning.
Q. You never knew you were to be a witness in this case until yesterday, did you?
A. No, sir.
Q. And had never talked with me until yesterday?
A. No, sir.
Q. Will you tell the jury how you happened to come here as a witness?

Mr. Fryberger: That is objected to as incompetent, irrelevant and immaterial.
The Court: Objection sustained.

(Exception by the plaintiff.)

[fol. 328] Mr. Davis:

Q. This ice that had been formed across the track, about how far did that extend, in feet, along the track?
A. Well, about from ten to twelve feet, I would say, where this roadway was.
Q. Where the roadway was?
A. Yes, sir.
Q. What kind of ice was it as to being hard or soft ice?
A. It was hard ice, sir.
Q. Had it gotten there suddenly or gradually by accumulation?
A. It had just gradually accumulated there.
Q. Throughout the winter?
A. Traveling back and forth throughout the winter.
Q. Do you know whether you have traveled across there or seen other people travel across there and seen the section forman around there?
A. I have traveled across there several times myself with a team.
Q. Was the section foreman when you had this talk with him down there, or where did you have this talk with him about the condition of the track?
A. Right at the depot.
Q. Was this before this derailment?
A. Yes, sir.

Cross-examination.

By Mr. Boyle:

Q. Who was it who spoke to you, Mr. Brewer, about coming to court and testifying?

[fol. 329] A. Mr. Lush.

Q. Who is he?

Mr. Davis: He is one of our employes, I told you.

Mr. Boyle: Well, we have a right to ask the witness.

Q. Who is Mr. Lush?

A. Well, now, I don't know as I could explain who he is. He is hired by this gentleman here, I suppose, to work for him on his job here.

Q. How long did you know him?

A. I met him yesterday morning, sir.

Q. Where?

A. In Cloverton.

Q. At what place in Cloverton?

A. At my home.

Q. How did you happen to meet him there?

A. Mr. Lush was looking for a fellow by the name of Mr. Holler and he went to Mr. Holler's house and Mr. Holler's sister came out with him and asked me if I knew where Mr. Holler was at and I told her yes, and I told her where he was at.

Q. So then you got into a conversation with Mr. Lush, did you?

A. Yes, sir.

Q. Then, you told him during that conversation, I suppose, that you knew all about this derailment down there at Cloverton?

A. No, sir.

Q. You do claim to know all about it, do you?

A. I know some about it, sir.

[fol. 330] Q. Then, Mr. Lush asked you to come up here as a witness?

A. Yes, sir he asked me to come up here as a witness.

Q. It was five o'clock that afternoon when you got in from the woods?

A. Yes, sir.

Q. Are you sure it wasn't earlier than that?

A. No, sir.

Q. You are sure it wasn't any later than that, I suppose?

A. It possibly might have been a few minutes later.

Q. Then you drove over to this pulpwood yard, as I understand it?

A. Yes, sir.

Q. That is not far away from the place where the car was derailed?

A. No, sir, it isn't far.

Q. How long did you live there at Cloverton?

A. Three years.

Q. Where did you come from originally?

A. I was born and raised in Illinois.

Q. How long did you live in Illinois?

A. I lived in Illinois till I was sixteen years old.

Q. Then where did you go?

A. I think I was like the rest of the young men, I started out to see a little of the country and I worked here and there till I got married and then I settled down in the northern part of Iowa.

Q. And how long did you live there?

[fol. 331] A. I lived there three years, sir.

Q. And when you left there, did you come to Minnesota?

A. I came to Cloverton, Minnesota.

Q. No one ever talked to you about this case until yesterday morning?

A. No, sir.

Q. Then, you remembered a good deal about it when it was called to your attention, did you?

A. No, sir, it wasn't called to my attention.

Q. You didn't have any conversation with Mr. Lush about that?

A. Yes, sir, we talked about it.

Q. When was that accident when the car was derailed?

A. It was in the latter part of February.

Q. Of what year?

A. Of 1928.

Q. You saw the car as you came into town?

A. Yes, sir.

Q. From the sleigh on which you were riding?

A. Yes, sir.

Q. Was there a good deal of snow at that time?

A. Yes, sir.

Q. It had snowed just shortly before that, hadn't it?

A. Yes, sir.

Q. The day before, do you remember?

A. No, not that soon before.

Q. A couple days before?

A. In the neighborhood of three or four days before, somewhere along there.

[fol. 332] Q. You had quite a snow fall at that time, did you?

A. I should judge somewhere between four and five inches. That would be my estimation of it.

Q. Was there a good deal of snow on the track where the car was derailed?

A. Yes, sir.

Q. Was that a natural fall of snow that was there or——

A. No, sir.

Q. How did it look to you that that snow got there?

A. It drifted in there.

Q. It had been blowing just shortly before this car was derailed?

A. Yes, sir.

Q. During the night, do you think?

A. During the night before the car was derailed.

Q. That is the time that this snow drifted in there?

A. According to my acknowledgment, that was the time the snow had drifted in there.

Q. When you got there you could see the conditions existing without any trouble, couldn't you? You could see just what had happened?

A. Yes, sir, you could see what had happened without any trouble.

Q. You could see where that car had been derailed all right?

A. Yes, sir.

Q. How far was that from where it finally landed in the ditch?

[fol. 333] A. Well, one set of trucks, I should judge, was possibly four feet off from the track and the other set was clear out just at the end of the car, the length of the car.

Q. I am trying to get your idea of the distance between the place where the wheels first went off the track and the place where the car finally landed.

A. Well, if I understand your question, sir, one set of the trucks was out practically the length of the car, I should judge possibly twenty feet from the track, and the other set was off from the track about six feet, I should judge, in just a rough estimation.

Q. So that the car was completely away from the track?

A. Yes, sir.

Q. There was no part of that car that was left up at the rails?

A. No, sir.

Q. And there was no part of that car that was within six feet of the rails?

A. Possibly the end of it was closer than that, sir, but the trucks wasn't.

Q. No part of the wheels that were?

A. The wheels, I should judge, was in the neighborhood of six feet or better.

Q. And by that you mean that a part of the box of the car itself might have been sticking over further towards the rail, or the coupler?

A. Yes, sir, it might have been over closer to the rail.

[fol. 334] Q. Or the coupler?

A. Or the coupler.

Q. And that truck just made a Y out from the——

A. Yes, sir, that car just turned out and made a Y from the main——

Q. What track was that down there at Cloverton?

A. That was the house track, sir.

Q. That is the last track from the depot?

A. Yes, sir.

Q. You have three tracks down there, haven't you?

A. Yes, sir.

Q. Then, if I get you rightly, that car made a Y out from the track and all of the wheels of the car were completely off and away from the track?

A. Yes, sir.

Q. So that no wheels were within a distance of six feet of the rail, in railway language, that would be the north rail?

A. No, sir.

Q. What rail would that be, the last one from the depot?

A. According to the way you fellows got it figured, if I ain't mistaken, it would be the west rail.

Q. Yes, according to the points of the compass that would be the west rail?

A. Yes, sir.

Q. So that there was no wheel of that boxcar that was within six feet of the west rail of the house track?

[fol. 335] A. Somewhere in that neighborhood of six feet I would say. I didn't measure it, but that would be my rough guess.

Q. What sort of marks were left there when the car went off the track?

A. They were just the wheel marks where it went over the—the flange struck on the rails and cut the ice through and the car went right on out into the snow and ice that was out to the side of the track.

Q. We have a plat here of the station down there at Cloverton, Mr. Brewer, and this arrow which is on the plat points north, according to the compass, but the railroad men tell us that in railroad language they say that the trains run east and west, do you know about that, too?

A. No, sir, I never knew about that until yesterday.

Q. Who told you about that?

A. Why, Mr. Davis.

Q. So you understand that to Dresser Junction we refer to it as going west?

A. Yes, sir.

Q. And to Superior we are referring to as going east?

A. Yes, sir.

Q. But as a matter of fact, the direction towards Superior is north and the direction towards Dresser Junction is south?

A. Yes, sir, that is a fact.

Q. And the depot, then, is on the east side of the tracks?

[fol. 336] A. Yes, sir.

Q. And the house track is the track furthermost west, isn't it?

A. Yes, sir.

Q. What I would like to know from you, Mr. Brewer, is the distance between the marks that were made by the flanges of the wheels and the boxcar. If the trucks first

went off the track at this point there would be marks on the track made by the flanges, wouldn't there?

A. There were marks cut through the ice there by the flanges.

Q. Did the car go for some distance beyond that?

A. No, sir, it turned out at an angle from the track right from there.

Q. And it didn't go forward any distance at all?

A. Oh, it went forward, the one end of it, the east end of it.

Q. The marks, I suppose, were made by the east trucks of that car first?

A. Yes, sir, I suppose it must have been.

Q. How far towards the east did those wheels travel after they left the track?

A. The one set of trucks traveled just about the length of the car, sir.

Q. Was the rear end of the car completely over those marks that were made?

A. The rear end of the car, if I remember right, was just about—the trucks were just about even with the marks when it stopped, possibly just a little east of them.

[fol. 337] Q. When you say east, you are using the railroad term for east, are you?

A. If I am not tangled up on it, I am, sir. I am using the north for the east there.

Q. So that you would say that the car traveled just about the length of the car, then, towards the east after the first trucks left the track?

A. Yes, sir.

Q. There wasn't anything to obstruct your view of the ice there?

A. Nothing only that loose snow around there.

Q. There was a good deal of loose snow there?

A. There was some loose snow over it, yes, sir.

Q. Was there an engine there at that time?

A. No, sir, the engine was gone.

Q. Were any other cars around there?

A. There was one car setting there.

Q. Where was that car?

A. That was back to the west, just a little ways from where the other one stood.

Q. How far from the derailed car was that one?

A. Well, I don't remember just how far, but I remember the car setting there close.

Q. Were they coupled together?

A. No, sir.

Q. How?

A. Not when I seen them.

Q. They weren't coupled together?

A. No, sir.

Q. Would you say they were a foot or two feet apart, ten feet or a hundred feet?

[fol. 338] A. Oh, that is kind of a hard question to answer. They were a little ways apart.

Q. Can you pick out some object to indicate about how far apart the cars were?

A. Well, I don't just remember how far apart they were now, but I remember the other one setting there.

Q. Did you talk to Mr. Lush about that?

A. No, sir.

Q. Didn't mention about the other car being there?

A. There wasn't anything said about the other car being setting there.

Q. So that you do not have any very clear recollection of just where that other car was?

A. No, sir, I didn't pay much attention to the other car.

Q. Put a mark on this plat showing us about how that boxcar formed a Y out from the track and about how far away from the track it was, could you do that?

A. Well, that would be a kind of a hard task for an amateur like me to try to do. I am not very good with a pencil.

Q. What is your idea of a distance of six feet, so that we will have a clear understanding of how far you think the car was from the westerly rail, the rail farthest away from the depot?

A. I don't just exactly understand that question.

Q. Well, will you pick out some object here that you think is six feet from where you are sitting so that we will [fol. 339] get your idea of distance?

A. Well, as near as I could judge six feet, Mr. Davis is nearly six feet tall.

Q. So that there would be room enough, then, for Mr. Davis to stretch out at full length between that westerly rail and the nearest part of the box-car after it was derailed

down there? That is your idea of it, as I understand you?

A. I should judge that he could stretch out about full length between the trucks and the track.

Q. There isn't any question at all but what all of those trucks were entirely over that westerly rail?

A. No, sir.

Q. Had any shoveling of snow taken place before you got there?

A. No, sir, no snoveling.

Q. No shovel had been used there at all?

A. I couldn't see where there had been one used.

Q. Well, you can tell by looking at a place of that kind whether or not some shoveling had been going on, I suppose?

A. Yes, sir, I think you could.

Q. And if there had been any shoveling there, I suppose you would have seen it?

A. I certainly would have noticed it.

Q. And you say there was no shoveling?

A. Not that evening.

Q. There isn't any waterway right around there at that point in the track, is there, any spring or anything like that?

A. No, sir.

[fol. 340] Q. This ice that you claim was there was just the natural accumulation of ice, was it?

A. It was accumulated by driving across the track there and on thawey days it had formed ice.

Q. Formed on account of that crossing that was there?

A. Yes, sir, as near as I could tell you.

Q. And it was just about the same distance along the track as the width of the crossing that had been made by you men driving over it?

A. Yes, sir, just about where the ice——

Q. That is all the ice that was along there any place, is what was made by that crossing?

A. Yes, that is the ice that was on there.

Q. And the reason that this ice was there was because you men had been driving over it with the sleighs or the trucks or whatever you used?

A. Yes, sir.

Q. That is what caused it to form?

A. That is what caused it to form.

Q. Well, how did you go over the track at that point, with sleighs or trucks?

A. Sometimes with sleighs and sometimes we was hauling down empty cars or hauling loads away and we would drive across and drag the eveners behind the horses, with log chains.

Q. Was that a regular crossing there, or was it just a crossing that was made for your particular purposes at that time?

A. They- at one time was a crossing there and it had been taken out, see. And we just made this here crossing [fol. 341] that winter and do every winter, driving back and forth with teams when we are loading wood.

Q. Going over the track at that old crossing?

A. Somewhere right close to the old crossing, very near there.

Q. And the idea of that is to haul the pulpwood from the depot side of the track over the main track, over the passing track and over the house track, over into the wood yard which is across the tracks from the depot, is that right?

A. No, that crossing where we crossed over just crossed the house track is all.

Q. It doesn't go over the passing track or the main track at all?

A. No, sir.

Q. Just what is the idea of having that way over the house track?

A. That was out there when there was two or three storehouses over there and they used to drive down between the house track and the passing track and cross over here to what we call the old Golmo warehouse.

Q. Well, why do you men use it now in the winter-time?

A. It is closer and handier for us than going around to the Main street. When we are loading wood it is handier to cars there and get the empties than to go down to the Main street and come up and get them.

Q. Cross there to get what?

A. Empty cars, haul empty cars down.

Q. Why do you have to cross there with the sleighs or the [fol. 342] trucks, then?

A. We used to cross there with the sleighs in the winter-time when we was loading pulpwood. We can't load from

the west side there off from the sleighs. The south there would be the west, wouldn't it? That is what you said, sir? That would be the west side on that side of the track, according to your estimation, and there is always pulpwood and stuff piled along there so you can't get up there with sleighs, so we drive over the track and in between the track of the house track and the passing track on that side and load off the sleigh or wagons, whatever we are loading off of.

Q. That is, if you keep your sleighs entirely across the house track from the depot, you can't load so well over there?

A. That is it.

Q. But you can take your sleighs or your trucks in between the house track and the passing track and you have a better opportunity to load?

A. You can get right up to the car then.

Q. So for that purpose you men used what was an old crossing to a warehouse in order to load your pulpwood?

A. Yes, sir.

Q. Then, if it is needed for any other purpose, if you want to get a truck in there to pull an empty boxcar or something of that sort, you use it for that purpose, too?

A. It is sometimes used for that purpose, too.

Q. There wasn't any other reason for the formation of any ice anywhere along that track, excepting that emer-
[fol. 343] gency crossing that you men had there? There wouldn't be likely to be any natural accumulation of ice or snow up over the tracks, excepting for the crossing?

A. Well, that is what caused it, yes.

Redirect examination.

By Mr. Davis:

Q. Do you know whether it had been a warm day the day before this derailment, or warmer than usual?

A. It seems to me that we had one warm day.

Q. What day of the week was it that you saw this car?

A. It was on Monday.

Q. On a Monday?

A. Yes, sir.

Q. A Monday evening?

A. Yes, sir.

Q. Now, this ice that had formed over these rails, I wish you would tell the jury again whether it was hard ice or just mushy ice or what it was.

Mr. Boyle: Wait a minute. Object to that as repetition and improper re-direct. The witness has already answered it and said it was hard ice.

Mr. Davis: Very well.

Q. Mr. Boyle asked you some of the things Mr. Lush said to you, asked you what Mr. Lush said to you, I wish you would tell the jury everything Mr. Lush——

Mr. Boyle: This is objected to as not proper re-direct examination, if your Honor please, hearsay, incompetent and immaterial.

[fol. 344] The Court: Objection sustained.

Mr. Davis: Exception. That is all, Mr. Brewer.

Recross-examination.

By Mr. Boyle:

Q. What day of the week did you say it was that you saw that car derailed?

A. Monday.

Q. Just what is it that calls to your attention now the fact that it was Monday?

A. Why, Mr. Halsted and I had bought some timber together and we started the cutting of that timber on Monday and that is the first day that we were working on that timber.

Q. And you can remember it was Monday night?

A. It was Monday night.

Charles L. Halsted, called on behalf of plaintiff, duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Where do you live?

A. Cloverton, Minnesota.

Q. How long have you lived at Cloverton?
A. Fifteen years.
Q. Where did you live before moving to Cloverton?
A. In Dickie county, North Dakota.
Q. On a farm or in town?
A. I was born on a farm in Dakota.
Q. Are you married or single?
A. I am married; have five children.
[fol. 345] Q. Mr. Halsted, who are you working for now?
A. Yesterday I was working for the Soo Line.
Q. Where?
A. At Cloverton, Minnesota.
Q. What doing?
A. Section laborer.
Q. Were you living at Cloverton in February, 1928?
A. About a quarter of a mile from town.
Q. You know Mr. Brewer?
A. Yes, sir.
Q. Did you work with him that month, February, 1928?
A. Yes, I did.
Q. Cloverton is a small town, is it?
A. Yes, sir.
Q. Do you recollect some time in the latter part of February of seeing a derailed car on the tracks of the Soo Line?
A. Yes, sir.
Q. When did you first see that car?
A. In the evening about between five and six when we came in from the woods.
Q. Did you go over to that car that night?
A. No, I did not.
Q. So you don't know anything about the condition that night?
A. No.
Q. Did you again see the car the next day?
A. About seven-thirty or eight in the morning.
Q. Did you go over to the car then?
A. Yes, I did.
[fol. 346] Q. Were you alone?
A. Yes, sir.
Q. And did you see where the car was derailed?
A. Yes, I did.

Q. State whether you saw any ice on the track.

A. I did.

Q. Just describe that ice as it was there where the car was derailed, how far it extended and where it was, in your own way.

A. Well, the ice had formed over both rails for a distance of ten or twelve feet where teams had been crossing there on a temporary crossing. This ice had formed by gradual accumulation of packed snow from the teams passing over those rails there and there was also ice formed along the rails for a considerable distance south of that where the flange of the wheels traveled and the wheels packing the snow along the rail and this had accumulated nearly up to the rail for a considerable distance.

Q. What do you mean by nearly up to the rails?

A. Up to the top of the rails.

Q. How far was this accumulation of ice where the flanges had run from the top of the rail, as you say?

A. Oh, nearly an inch.

Q. Go ahead and describe that condition to the jury.

A. Well, the ice was hard there—do you want just the condition of the ice?

Q. Yes, the condition of the ice first.

A. As I said before, that ice had formed by traffic across [fol. 347] the rails and also by cars passing up and down that track and flanges of the wheels, and this was so hard that ordinary traffic would not dent it and where the wheels had crossed the rails there was the marks of flanges, but the wheels themselves made no impression in the ice, except the flange.

Q. About how wide was this strip of ice where this car was derailed?

A. About ten or twelve feet long, the length of the track, and across both rails.

Q. What was the condition of the ice, as to being over the rails at any place?

A. Oh, from an inch to two inches thick at the crossing.

Q. Now, that ice was over one or both rails?

A. It was over both rails.

Q. Now, the ice over both rails extended what distance, would you say, along the track?

A. About ten or twelve feet.

Q. State whether when you saw this car that was derailed, you saw where it had come through the snow before it was derailed.

A. Yes, I did.

Q. Can you describe the mark that the wheels or the flanges made in the snow before it struck this ice?

A. Well, for a distance of four or five rods the drifted snow had packed on the rail so the wheels traveled on this snow. There was probably maybe half an inch of packed snow right on top of the rails for a considerable distance [fol. 348] south of this crossing where it left the track and the snow was pushed to the sides from the box car pushing into it between the wheels.

Q. Did you see or notice any marks on the rails?

A. There was marks of the flanges where they left the track.

Q. And where was that with reference to this ice, how far east of the ice where the ice first started?

A. Well, it was right at where this hard ice was on the crossing.

Q. Where the hard ice was on the crossing?

A. Yes.

Q. You never knew Mr. Moquin?

A. I may have seen him as a brakey, but I don't know him.

Q. You don't know him personally and you never knew you were to be a witness until yesterday?

A. No, sir.

Q. And you have no interest in this case?

A. No, sir.

Q. And yesterday afternoon you were working as a section man for the Soo railroad?

A. It was right at noon. We were eating dinner.

Q. That is when you met Mr. Lush?

A. Yes, sir.

Q. And you expect to go back to work for the Soo Line?

A. As far as I know.

[fol. 349] Cross-examination.

By Mr. Boyle:

Q. I didn't quite hear everything that you said—the ice that you claim was up over the rails was at the point where the wagons or sleighs had been going across the track?

A. Teams and sleighs.

Q. Yes; teams and sleighs?

A. Yes.

Q. And that was just a winter crossing that was used by you men for the purpose of hauling the pulpwood in between the house track and the passing track in order to load it, is that right?

A. Yes, and quite often we crossed with the team without a load when we wanted to move a car. Our jammer team worked on the west side of the track and in order to move an empty car down we had to bring our team over on the east side of the track to give the team footing because there was a ditch on the west side and you couldn't put the team in the ditch to move the cars and we crossed there with the double trees dragging behind the team several times a day when we were loading, every time we had to spot a car, and that meant two or three spots of each car.

Q. And when you use the directions east and west you mean according to the compass?

A. Yes, sir.

Q. You are not using the railroad terms now at all?

A. No, sir.

Q. That is the only place along that house track where [fol. 350] there was any ice on top of the rails?

A. Well, that was the worst place, the ice. That particular morning there was packed snow on the rail for a considerable distance there which had formed after that accident, I suppose. It was snow that had pushed down on the track there and it was right on the rails for a considerable distance there.

Q. Oh, I see.

A. But this hard ice was just at the crossing there.

Q. Yes. The other ice that you have just now referred to, if that was ice, that was what was packed down by the car that left the tracks?

A. Well, not necessarily that car. Probably others, too. The snow there was about a foot deep and naturally some of that had to go under the wheels and would cause the flange track to be filled up so that the wheels did not travel on the rail. In a good many places there the flange had packed and formed a hard ice track along the rail, so that the car wheels traveled on the track of ice, rather than on the rails.

Q. That was the condition at the crossing, was it?

A. Well, for several rods south of the crossing there there was pulp piled along the tracks so that every wind drifted snow in there and that drift had, of course, to be broken open every time they shunted cars through there. The reason I remember so closely was because——

Q. Just a minute. Did you see the snow that was packed [fol. 351] by the car that went off the track there?

A. Where do you mean, on the track?

Q. Well, on the track and the roadway that was made as it went off the track?

A. Well, yes, I saw the tracks made by this car there.

Q. That packed down so that that made what seemed to you to be ice or hard snow?

A. Right on the rail, yes.

Q. What is that?

A. Right on the rail, right on top of the rail.

Q. Right on top of the rail?

A. Yes. Of course, outside the snow wasn't hard.

Q. Where was that car, how was the car standing as it landed after it was derailed?

A. At an angle of about thirty degrees with the track.

Q. How far away from the track was it?

A. Well, it was—the nearest point of the car I should estimate to be about three feet from the rail.

Q. You are talking about the wheel now?

A. No, the car.

Q. The car itself. And what would be your judgment of the distance between the rail and the nearest wheel?

A. Between four and six feet. I didn't measure it.

Q. What is your idea of the distance between the two cars, or do you remember seeing another car there?

[fol. 352] A. I don't remember. There might have been cars there. I don't remember now whether there was or not. I didn't pay any attention to them. This one car interested me because it was off the track.

Q. You don't remember whether there was another car coupled or a short distance away from it?

A. There was none coupled to it. There might have been one a short distance from it.

Q. You don't remember getting down and looking under any car to see these marks on the track?

A. No, I wasn't under any car.

Q. Or to see the ice that you claim had accumulated along the track?

A. I could see it without getting under.

Q. You didn't get down?

A. No, sir.

Redirect examination.

By Mr. Davis:

Q. Do you know how long before you say this derailed car that that ice had been over the rails and along the rails to the south?

A. Well, I know it was there when we were loading and that was about a week before that.

Q. And do you know whether or not during that time, some days before, it had melted or the weather was warm, or do you remember that?

A. I think on Saturday it was warm during the middle of the day.

[fol. 353] STEPHEN J. BURDEN, called on behalf of plaintiff, duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. Mr. Burden, where do you live now?

A. Spooner, Wisconsin.

Q. And how long have you lived at Spooner?

A. Why, I have lived there since last October.

Q. What work are you engaged in?

A. Painting, decorating.

Q. State whether last evening about six o'clock I called you up over the phone and talked to you over the phone?

A. It was somewhere between six and seven. I was working. My wife came after me.

Q. State whether or not I asked you at that time if you had been at Cloverton at the time of this derailment?

Mr. Boyle: This is objected to as improper, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(Exception by plaintiff.)

Mr. Davis:

Q. Well, did I talk to you over the phone?

A. Yes, sir.

Q. Did you come here at my request?

A. I did.

Q. And you arrived here this morning about seven o'clock?

A. Somewhere in the neighborhood of seven.

[fol. 354] Q. And what time did you leave Spooner last night?

A. About eleven-thirty.

Q. And drove all night?

A. Yes, sir.

Q. Where were you living in February, 1928?

A. In Cloverton, Minnesota.

Q. And what were you doing at Cloverton?

A. Well, I was in the logging business there in the winter. That is, logging pulpwood.

Q. And do you recollect in the latter part of October (February) of a car being derailed on the Soo Line?

A. Yes, sir.

Q. Were you in town that day?

A. I was.

Q. Did you see the derailment or see the car shortly afterwards?

A. Why, I saw it from a distance before they quit moving.

Q. Did you go over to where the derailment occurred?

A. I did.

Q. And did you see any men around there?

A. I saw the train crew helping one of the members of their crew into the depot, on the depot platform.

Q. Who helped carry him?

A. I didn't see their faces, but as near as I could tell it was the rest of the members of the crew.

[fol. 355] Q. Now, did you go over to where this car was derailed?

A. I did.

Q. And did you notice the condition of the track there?

A. Why, it was covered with ice and some bark mixed in with the ice and frozen on the rails.

Q. Was it above the top of the rails?

A. Yes, sir, it was.

Q. About how thick was that ice over the top of the rails?

A. Well, I didn't measure it, but from the looks of it imagine between an inch and two inches.

Q. You may state to the jury whether or not you could see where the flange of the wheel had cut through the ice?

A. Why, it cut down a certain amount, but it didn't cut clear down so that it could hold to the rail. The ice raised it up and naturally it left the rail.

Q. Did you notice any marks on the rail or did you observe those at all?

A. Why, I noticed the flange marks where they had turned up some of the ice and turned off sideways.

Q. Do you know from living at Cloverton how long that ice had been on the tracks there and covered the rails?

A. Why, it had been on there some days. I would not try to say exactly how many days, but it must have been a week or ten days.

Q. Did you have occasion to go over that track?

[fol. 356] A. Yes, sir.

Q. And do you know about how long along the track this ice over the rails extended?

A. Why, the natural length of a team crossing, possibly twelve feet.

Q. And was that ice hard ice?

A. Yes, it was good hard ice, packed down by horses' feet.

Q. And do you know whether or not while you were there before this accident, shortly before it, sleds went over this track?

A. Why, sleds went across there every day of the week excepting Sundays.

Q. And was the ice over the rails so that the sleds would go right over the tracks?

A. Absolutely.

Q. Would they touch the rails?

A. No, sir.

Q. And that condition you say, had been there for a week, to your knowledge?

A. Yes, all of that.

Q. Now, did you see where the wheels of the car had struck the ice where it derailed?

A. Yes, sir.

Q. Is that where it started to go off the track?

A. Well, it raised—yes, it raised from the rail, the wheels did, and of course naturally they veered off sideways.

Cross-examination.

By Mr. Boyle:

Q. Mr. Burden, the car as I understand your testimony, left the track, or you could see marks in the tracks where [fol. 357] the car left the rails?

A. Why, certainly you could see the flange marks.

Q. Yes, you could see the flange marks in the ice that you claim was above the rail?

A. Yes, sir.

Q. And that was right at the point where that crossing was over the track?

A. Yes, sir.

Q. That crossing that you men used to haul pulpwood in between the house track and the passing track?

A. Yes, sir.

Q. There wasn't any loose snow covering that crossing at that time, so that you could see it clearly?

A. Why, yes, there had been snow drifted across there, the natural drifting of snow in the winter time, but the way the snow was tore up there you could see the ice plainly in the bottoms of the tracks.

Q. Did the snow cover the crossing or had that been cleared out?

A. Why, yes, as a drift drifts in it doesn't drift evenly across anything. It will catch and whirl around and be a small drift here and one the next place.

Q. What is your recollection about how that derailed car was located?

A. Why, it was setting with the end of it headed towards the warehouse that used to be used for feed and grain there, [fol. 358] and if it had went another half a car length it would have went through the warehouse, so I imagine it was nearly the length of itself, setting crossways of the track; that is, about on a forty-five——

Q. At an angle of about forty-five degrees?

A. Somewhere around there, yes.

Q. What was the distance between the rail and the nearest wheel of the car?

A. Well, now, I wouldn't say for sure. I didn't measure it, but imagine it would be between one and three feet or maybe a little closer. That is, the closest wheels that were to the rails.

Q. You think the wheel was up rather close to the rail, then, do you?

A. Why, yes, the trucks on one end of the car were.

Q. Was there another car coupled onto the derailed car?

A. I wouldn't say. They had took the engine down by the time I took care of my team and I believe they had ahold of two cars and pulled one out. I wouldn't say for sure because I stopped my team back behind the warehouse and blanketed them before I went down there.

Q. Well, when you went over to the place of derailment was the engine still there?

A. The engine was going out to the main line.

Q. The engine was what?

A. They were taking the engine back on the main line to put in on the train.

Q. They had already taken the engine away from the derailed car, then?

[fol. 359] A. Yes, sir.

Q. Was another car left there at that time?

A. I don't think there was. I think they had moved the other car if they had a car. I know the engine was going back on the train and I didn't notice whether they had another car or not.

Q. So that at the time you were making this examination there was only one car at the place of derailment?

A. That is all I noticed.

(Recess.)

Mr. Boyle: I would like to call Mr. Halsted for two or three more questions on cross examination. I have already intimated to the court—that we feel that we will have to take advantage of your Honor's suggestion and ask for some little time in which to make some investigation of this new testimony that has come in. Now, in order to do that it seems to me we are going to have to ask the court for an adjournment at this time. I might say to your Honor that my plan is to go down to Cloverton to find out what the situation is. It is some distance down there.

Mr. Davis: We certainly join in that request and consent to it.

The Court: Were there any other witnesses you cared to examine outside of Mr. Halsted before you make that trip?

Mr. Boyle: I think that is the only witness.

CHARLES L. HALSTED, recalled by defendant for further cross examination, testified as follows:

[fol. 360] Cross-examination.

By Mr. Boyle;

Q. Mr. Halsted, there were just one or two questions I wanted to ask you to make sure that I understand your testimony. When you went over and examined the place of the derailment, you could see the marks that were made where the car left the track, could you?

A. Yes, sir.

Q. And those marks, as I understand your testimony, were right at this temporary crossing?

A. Yes, sir.

The Court: Pursuant to the request of counsel for the defendant, consented to by counsel for plaintiff, court will now adjourn until tomorrow morning at ten o'clock. I have cautioned all of the members of the jury before, but I would like to again say that during this adjournment and any recess, you should not permit anyone to speak to you concerning this case in any manner, nor should you discuss it among yourselves until the case is finally submitted to you for your consideration in the jury room, and if you should find yourselves at any time in any place where people are speaking about the case or discussing it you should make it your business to get away from any such company, to the end that when you come to determine the facts in this case you will determine those facts from the evidence received here in court and from nothing else. You are now excused until ten o'clock tomorrow morning.

Adjourned to 10:00 o'clock A. M. of the next day, Thurs-
[fol. 361] day, May 23, 1929.

Court reconvened at 10:00 o'clock A. M. Thursday, May 23, 1929.

For the Defendant

LOUIS KNUTSON, called on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Where do you live, Mr. Knutson?
A. Brainerd.
Q. How long have you lived in Brainerd?
A. About twenty years.
Q. What is your business or occupation?
A. Civil engineer.
Q. How long have you been practicing as a civil engineer?
A. More than twenty-five years.
Q. Do you have some position in Crow Wing county at the present time?
A. I am the present county surveyor, yes.
Q. How long have you held that position?
A. Six years.
Q. Did you go over to Cloverton with us yesterday to take some measurements to make a plat?
A. I did.
Q. Have you put down on a plat the measurements that were taken?
A. I have a diagram showing the results of the measurements.
Q. When you got to Cloverton you may explain what was [fol. 362] the first thing that was done there?
A. When we arrived at Cloverton we went to the scene of this derailment which is in question, I understand, as shown us by yourself and other members of your staff, and proceeded to mark and locate with reference to the track and the north end of the station of Cloverton the marks of the derailment and the surrounding conditions.
Q. Did you find when you got there any place that could be used as a crossing?
A. A crossing of the track?

Q. Yes.

A. Yes, sir.

Q. And did you mark out that crossing in any way?

A. I have shown it on my diagram.

Q. Yes, but out there on the ground?

A. Yes, we marked with a stake at each rail the limitations of the crossing as shown by the conditions on the ground and also the center of the crossing marked by a red and white pole stuck up along the center line of the track.

Q. Then did you also put some other sticks along the track?

A. We marked with stakes some two feet high along the outside edge of what would be the westerly rail as the track runs there. We set stakes there to locate abrasions on the rail as caused by this derailment.

Mr. Davis: I will ask that "caused by this derailment" be stricken out as stating a conclusion of the witness.

[fol. 363] The Court: That portion may be stricken.

(Exception by defendant.)

Mr. Boyle:

Q. Take the plat that you have made; you have it here with you, have you?

A. I have this one here, yes, sir.

Q. Is this plat which is now marked as Defendant's Exhibit "12" the plat that you made showing the situation out there at Cloverton?

A. That is the result of our measure, yes, sir.

Q. What is indicated by the blue marks with the cross in the middle?

A. The blue marks with the cross in the middle is the location of where there had been a team crossing.

Q. And that was across what is known as the house track which is shown on your plat as the house track?

A. Yes, it is labeled house track right on there.

Q. And what was on south along the house track from the crossing that you refer to?

A. On the track or off-side?

Q. Off the track.

A. Off the track there is a ditch alongside the track and there is the remains of the foundation pillars of an old building there, some of the remains.

Q. Did you locate the pillars of that old building?

A. We did.

Q. And are these little square marks shown on the plat the pillars there?

[fol. 364] A. Those are the locations of the pillars now visible.

Q. How far to the north did the ditch extend?

A. The ditch extends for some considerable distance excepting right where the team crossing is. It has been filled there.

Q. And how much of the ditch had been filled there where the team crossing was?

A. Well, it was full of debris and dirt and something to fill up the ground there so that a team might conveniently pass.

Q. Did you notice whether there was a ditch on the northerly side of the crossing, too?

A. To the north of the crossing there is more or less of a ditch extends there for, oh, a hundred feet or more at least.

Q. What is this red mark? I see you have "ditch" marked on there?

A. That is the center line of the ditch as it is located with reference to the track there.

Q. So there were some of the foundation blocks right into a part of the ditch?

A. Those on the side of the ditch nearer the track.

Q. How far to the south of the crossing did that ditch run?

A. Oh, it extends considerable to the south. It gets shallower and more or less filled with debris, as some of those ditches get, but there is a ditch for a considerable distance there.

Q. Did you notice on farther to the south there was a loader of some kind there?

[fol. 365] A. There was what is ordinarily termed in lumbering a jammer standing there. Near the track there, yes, sir.

Q. Did the ditch extend down to where that jammer was located?

A. The jammer was on a little higher ground than the location immediately next to the crossing and there wasn't

so much of a ditch. There was a little depression between the track and this bank.

Q. What is this place up here? What color of crayon is that?

A. That is green and it represents the location as outlined to us and some evidence of outline there of an old warehouse or building of some sort having been there at some time in the past.

Q. What is shown by the little red arrows on the plat?

A. Those little red arrows give the location of the stakes which were placed along the outside of the rail as shown there to indicate abrasions on top and on the sides of the rails.

Q. What was the width of the crossing or rather the limitations of the crossing that you found there?

A. The limitation of the crossing, as I recollect now, is fifteen feet. I haven't the notes with me. Mr. Campbell has those in my office with the photography plates.

Mr. Boyle: Do you have those notes, Mr. Campbell?

Mr. Campbell: Yes, sir.

Mr. Boyle: Let me have those.

[fol. 366] Q. Mr. Campbell was with you in making these measurements and in making this plat, Defendant's Exhibit "12"?

A. Yes, Mr. Campbell and I made this together.

Q. Who is Mr. Campbell?

A. Mr. Campbell is city engineer of Brainerd.

Q. This plat, Defendant's Exhibit "12," was made by you and Mr. Campbell?

A. Yes, sir.

Q. Referring to your notes tell us, please, the width of the crossing that you found down there, of the wagon crossing?

A. Fifteen feet.

Q. Was there any other place along the house track, either to the north or to the south, that could be used as a wagon crossing?

Mr. Davis: When do you mean? Yesterday?

Mr. Boyle: I mean any time.

Mr. Davis: Object to it as no foundation laid, at any time, witness not shown himself competent to testify, no

evidence that the conditions were the same a year and three months ago as now, no evidence that the conditions are the same at all.

Mr. Boyle: I would like to ask you as to the conditions as you found them there, Mr. Knutson, as to whether or not on either side of this crossing, under the conditions existing there, there was anything to indicate that a crossing had been used or could have been used, either under summer conditions or under winter conditions?

Mr. Davis: I will object at the present time as no founda- [fol. 367] tion laid and ask the privilege of cross-examining.

Mr. Boyle: Well, if your Honor please, the evidence cannot all be produced at one time and I prefer not to have any interruption in my examination, but I will undertake to show the foundation for all of this testimony.

Mr. Davis: I think that that is improper because he is asking a conclusion of this witness. There is nothing to show that this witness has ever been there before yesterday.

The Court: Mr. Reporter, will you read the last question, please?

(Question read as follows: "Q. I would like to ask you as to the conditions as you found them there, Mr. Knutson, as to whether or not on either side of this crossing, under the conditions existing there, there was anything to indicate that a crossing had been used or could have been used, either under summer conditions or under winter conditions?")

Mr. Boyle: Now, in connection with that question, Mr. Knutson, you may assume that the conditions existing now are exactly the same with the exception of the snow as they were at the time of the accident.

Mr. Davis: That is objected to as assuming a fact not shown and also as immaterial because it clearly shows that conditions are not the same and it calls for the pure conclusion of the witness without any foundation being laid [fol. 368] that the witness knows anything about the conditions a year ago last February.

The Court: The last objection is sustained. The witness may testify as to the conditions as he found them there.

(Exception by defendant.)

Mr. Davis: There is no objection to that.

Mr. Boyle: Well, did you find any evidence——

Mr. Davis: Just a moment.

Mr. Boyle: —of any crossing anywhere excepting the crossing that you put on your plat, Mr. Knutson?

Mr. Davis: Well, let that go. He may answer that.

A. I found no evidence of any crossing there.

Mr. Boyle:

Q. Did you give us the width of the crossing?

A. Fifteen feet.

Q. We had better put that mark on the plat?

(Witness marks on plat.)

Q. In the place that you have marked "15," is what?

A. Those are the outside limits of the crossing there as shown by the conditions there now.

Q. In taking the measurements as to the marks on the track from what point did you take the measurements?

A. Do you want to refer to this entire map?

Q. Yes.

A. Well, in locating this entire diagram, it was with reference to the north end of the Cloverton station, that is, [fol. 369] as projected across to the house track.

Mr. Fryberger: The station house?

A. Yes, the station house. Our measurements were made along the track towards the scene of this derailment or towards the crossing.

Mr. Boyle:

Q. You have located on the plat, have you, the Cloverton station and the platform?

A. Yes, sir.

Q. The depot down there?

A. The depot down there at Cloverton.

Q. That is on the easterly side of the main line?

A. Yes, sir.

Q. Now what is the distance between the crossing and the first mark that you have shown on your plat, first mark on the rail?

Mr. Davis: You mean from the west end of the crossing.
Mr. Boyle: Well, I am going to get that.

Q. Which would be the best way to put that, Mr. Knutson? Would that be the distance from the first mark on the rail that I have just referred to to the middle of the crossing or to the southerly edge of the crossing?

A. Well, it doesn't make any difference. We have stations along there. In making our measurements we put a zero opposite the station house and made our measurements direct along there so that it has a station number. I haven't made the subtractions there for the differences between each mark.

[fol. 370] Q. But you can?

A. I can readily do that.

Q. You can give the distance whichever way we want it, can you?

A. Yes, sir.

Q. Tell us how far it is from the first mark on the track to the southerly line of the crossing that you have referred to in your testimony.

A. The mark on the rail nearest the crossing, is that what you want?

Q. Yes, from the southerly side of the crossing?

Mr. Davis: We have been continually using railroad directions in much of the testimony. It occurs to me that if you say the west end of the crossing the record might show much clearer.

Mr. Boyle: I find that we are likely to have some confusion between the railroad directions and the directions as shown on the compass. I think so far as Mr. Knutson's testimony is concerned that the record ought to show that we are referring to the directions as he uses them and not in railroad terms.

Mr. Davis: Very well.

Mr. Boyle:

Q. What we have reference to, Mr. Knutson, is that although the tracks may run north and south, the railway men refer to going east or going west on the track, but I

want you to disregard that and give us the directions as they actually are.

A. That first mark from the crossing is south of the crossing twelve feet.

[fol. 371] Q. Will you put a mark on the plat showing that distance?

(Witness does so.)

Q. Rule out a line there. Now, what is the distance between the southerly line of the crossing and the second mark that you found on the rail?

A. Thirteen feet.

Q. You have put those distances on your plat now, 12 feet and 13 feet, have you?

A. Yes, sir.

Q. What is the distance between the southerly line of the crossing and the third mark that you found on the rail?

Mr. Davis: What was the measurement of the second place?

Mr. Boyle: 13 feet.

A. 14.3.

Q. The distance between the fourth mark that you found on the rail and the southerly line of the crossing?

A. 16.2.

Q. You have put all of those distances now on your plat, have you?

A. Yes, sir.

Q. There is a fifth arrow from the southerly line of the crossing, what does that indicate?

A. That is another abrasion on the rail.

Q. And what is the distance between that abrasion on the rail and the southerly line of the crossing?

A. 27½ feet.

Q. And then farther along to the south you have—what [fol. 372] do you call that mark?

A. That is a cross or a star.

Q. What is that mark?

A. That is another abrasion which was not marked by a stake.

Q. How did it hapapn that that was not marked by a stake?

A. Well, it was overlooked at the time being and the purpose of these stakes was to show the photographs which was taken and this didn't happen to get a stake down. We were hurried on account of the light for the photographer.

Q. What is the distance between that mark and the southerly line of the crossing or that abrasion on the rail to the southerly line of the crossing?

A. Thirty-nine feet.

Q. What is the scale of the plat which you made for us?

A. Drawn to a scale of one inch making five feet on the map.

Q. And you show the passing track and also the main line track and have marked them passing track and main line track?

A. Yes, sir.

Cross-examination.

By Mr. Davis:

Q. You were requested to go down there by the railroad company?

A. Mr. Boyle asked me to go.

Q. You are the county surveyor of this county?

A. Yes, sir.

[fol. 373] Q. Was that the first time you were ever at Cloverton?

A. I have never been to Cloverton before.

Q. When you got there yesterday it was a warm, a reasonably warm, day in May?

A. Yes, sir.

Q. Pretty nice day, wasn't it?

A. Not bad.

Q. And there was quite a crowd of men, Mr. Boyle and Mr. Fryberger and Mr. Fullerton and Mr. Swanson and myself; in fact, you had quite a gallery looking on?

A. We had lots of witnesses.

Q. Now, so far as you know you do not know how those marks were made on that rail, or course?

A. No information whatever.

Q. You merely had pointed out to you certain marks on a rail?

A. There were marks visible on the rail.

Q. Those were pointed out to you?

A. Yes, sir.

Q. You put a stake there at the request of counsel?

A. Yes, sir.

Q. You don't know of your own knowledge whether that rail was there at the time of the accident a year and three months ago?

A. I can't say anything about that.

Q. There was no snow on the ground?

A. Not yesterday.

Q. This ditch which is to the south, would you call it, by the compass?

[fol. 374] A. Be to the west of the house track.

Q. To the west of the house track, running from the southerly side of the crossing towards the south, you don't know whether that was in the same position as to having debris and wood and pulp in the ditch as it was at the time of the accident?

A. I don't know that, no.

Q. You don't know whether this ditch had been cleaned out every spring after the accident?

A. Didn't look like it.

Q. Well——

A. I don't know.

Q. You couldn't tell anything about a year ago last spring?

A. Absolutely not.

Q. And it didn't show, of course, and you couldn't show by a plat or anything that you saw and you don't know that the condition of the ditch was the same as it was a year ago last February, of course?

A. I don't know anything about that.

Q. Now, you did make a showing here of certain cement blocks?

A. Yes, sir.

Q. Did you measure from the height of those cement blocks to the height of the rail of the house track?

A. I didn't take an elevation on there any more than looking across there. The top of those have a certain relation with the track.

Q. Did you run a tape across so as to see or just your visual examination? Did you make any examination, other [fol. 375] than a visual examination, to determine the height

of the top of those cement blocks as compared with the top of the rail?

A. No measurement.

Q. Did you use the tape? A steel tape is fairly solid.

A. No.

Q. Do you not know that the top of those cement blocks is nearly four inches higher than the top of the house track rail?

A. I don't know.

Q. Would you say that would be about right?

A. Well, I would say that the top of those blocks was somewhat higher than the top of the rail.

Q. Would you say around four inches?

A. I would say less than that.

Q. How much less?

A. Oh, possibly half of that.

Q. Then from your observation, you would say the top of those cement blocks are about two inches higher than the top of the rail on the house track, that would be your judgment?

A. At a random guess.

Q. Yes, I understand. I realize you didn't measure it. We happened to, but I am just wondering if that would be your best judgment?

A. I would think possibly that is reasonably close.

Q. I notice here a cement block that angles, that is, a cement block that shows indications of having been knocked over?

[fol. 376] A. Yes, sir.

Q. Or pushed over?

A. It is pushed over or at least it is reclining at about forty-five degrees, some such a matter now.

Q. And it is shown reclining away from the track?

A. Yes, sir.

Q. So that whatever force pushed the block pushed it away from the track rather than towards the track?

A. I would judge so.

Q. I notice that there is no cement block at the corner here; is it not a fact as you looked there you found another cement block or a portion of it lying on the ground close to this cement block which showed it had been pushed over?

A. Well, there were various kinds of debris lying around there by those foundation blocks.

Q. Was there not a piece of cement which would convince you, or at least make you feel reasonably certain, that from this corner there had been taken a piece of cement at least eight or ten inches high or eight or ten inches thick, lying about a foot or two from that block that had been pushed in a direction away from the track?

A. I didn't make any observation of that.

Q. Now, this crossing when you measured it showed the ties were lighter there evidently than on either side? There wasn't any crossing there yesterday, was there?

A. No, there was no crossing there yesterday.

[fol. 377] Q. There was no crossing there yesterday that a team could use in taking a wagon and going over there, that is true, isn't it?

A. Yes, that is true.

Q. In other words, the rails were up just the same above these ties as they were to the south or the north?

A. Yes, sir.

Q. There was no filling up either to the west or the east of this crossing and the rails showed the same between the two blue lines as they did to the east or west or north or south, didn't they?

A. Yesterday they did.

Q. The height of a rail I think is close to five inches?

A. Depends on the size of the rail.

Q. Did you measure the height of this particular rail?

A. I did not.

Q. Well, what would you say its height was?

A. I don't know.

Q. Have you any idea?

A. Well, it would be a guess if I said anything. Four or five inches.

Q. And that projected up above the ties and the ties ran through here the same as they did to the north and south?

A. Yes, sir.

Q. So that this crossing as it appeared there did not appear to you as a crossing that is now used in the summer time at all, did it?

A. It is not in use now.

[fol. 378] Q. Of course, you don't know where this snow had filled these ditches at the time of the accident? You don't know anything about that?

A. About what?

Q. You were not asked at the time of the accident to go out and make any measurements?

A. No, sir.

Q. Yesterday or the day before was the first time you were asked to make any measurements in this case?

A. Yes, sir.

Q. And you don't know whether the snow was over the top of the rails and over the top of these cement posts in February, 1928, do you?

A. I don't know anything about the snow.

Q. Nor how hard the snow was?

A. No, sir.

Q. Nor how much this ditch was filled with wood and pulp and debris, you don't know that?

A. No, sir.

Q. So to summarize it, what you did was merely to make the measurements that railroad counsel asked you to make, having pointed out to you what they wanted?

A. Absolutely.

Redirect examination.

By Mr. Boyle:

Q. Mr. Knutson, you said there was no crossing that is being used at the present time; what do you say about whether or not there is an approach up to the track that could be used as a crossing?

[fol. 379] A. There is an approach there that shows evidence of having been used for a crossing.

Q. Yes, and could be used now up to the tracks?

A. Up to the rail, yes.

Q. And that ditch at that point is entirely filled with material, sort of a corduroy there, wasn't it?

A. Well, there is debris of various kinds in there, stuff used to fill up temporary crossings with and ditches and places of that kind.

Q. Yes, but there was no permanent crossing built over the rails at that point?

A. No, there is no crossing planks or anything of that kind.

Q. Is that what you meant when you said there was no crossing there?

A. Yes, sir.

Q. And then, of course, on the easterly side the ground all along the track is practically level, isn't it?

A. Yes, sir, there is very little difference in elevation between the tracks there.

Recross-examination.

By Mr. Davis:

Q. And I will ask you if it is not a fact that from this crossing to the west there is no evidence and wasn't yesterday afternoon of any wagon wheel tracks having gone across those rails in recent times? There wasn't a thing to show that, was there? Isn't that true?

A. Depends on what you mean by recent time.

Q. Well, there weren't any wheel tracks showing that the [fol. 380] wheels had gone over these rails recently, that is true, isn't it, Mr. Knutson?

A. Well, I couldn't say as to that.

Q. Well, you didn't notice any?

A. No, not fresh abrasions.

Q. Did you notice and did you measure from the house track to the passing track and determine how much lower the house track was to the top of the rails than the passing track?

A. I did, but not a part of my record.

Q. The passing track at or near the place where you made these measurements is lower, the top of the rails, than the top of the rails of the passing track?

A. Yes, sir.

Mr. Fryberger: No.

Mr. Michel: You used the word passing track both times.

Mr. Davis: Well, no, the top of the rails of the house track at or near the point where you made this examination where this crossing is are considerably lower than the top of the rails of the passing track?

A. Well, there is some difference in elevation.

Q. Would you not state they are at least five to six inches lower?

A. Oh, yes, all of that.

Q. And would you say that, in your opinion, they are more than that?

A. They might be.

Q. What would be your opinion as to how much more?

[fol. 381] A. I don't know. Might be seven or eight inches.

Q. And the ground slants from the passing track downward towards the house track, doesn't it?

A. Yes, sir.

Q. Maybe around eight inches there would be a slant from the passing track down towards the house track, that would be your opinion?

A. Yes, there is a slope there.

Q. And it might be a foot if you would measure it?

A. I am not saying what it would be.

Q. You would not say it wouldn't, would you?

A. No.

Q. Now, where you were shown these marks on the rails you did not find any marks to the west on the ties of any flanges of any wheel cutting into the ties, did you?

A. I didn't see any.

Q. None were pointed out to you?

A. No, sir.

Q. At any point from the crossing southerly to the sixth mark that you measured?

A. No.

Q. You found no indication of any flange of a wheel having cut into any tie along there, that is true, isn't it?

A. Yes, sir.

Q. And none was pointed out to me?

A. None shown me.

[fol. 382] RUDOLPH RAASCH, recalled on behalf of defendant, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Mr. Raasch, one of the witnesses who testified yesterday, I think it was Mr. Brewer, referred to a roadway made right at what we call the old Golmo warehouse, at Cloverton, do you know what was the old Golmo warehouse?

A. I don't exactly know by the name which was really the Golmo warehouse.

Q. At the time of the accident in which Mr. Moquin was injured was there a warehouse right at that point, or I mean nearby?

A. Yes, there was a warehouse near the crossing.

Q. Did you also go down to Cloverton with us yesterday?

A. Yes, sir.

Q. Did you put down stakes at the corners of that warehouse?

A. Yes, sir.

Q. Where did you put the stakes that I have just referred to?

A. On the corner where the warehouse used to be.

Q. Is that shown by this rectangle in green?

A. Yes.

Q. On the plat, Defendant's Exhibit "12"?

A. Yes.

Q. Did you also see the marks along the track where the [fol. 383] stakes were standing out there yesterday?

A. Yes, sir.

Q. When were those marks made on that track?

A. At the time of the derailment.

Q. Were those marks there before the derailment?

A. Never noticed them.

Q. And you saw them there immediately after the derailment, did you?

A. Yes, sir, that is what I found.

Q. And is the track now the same as it was then so far as the steel, the ties and so forth are concerned?

A. Yes, sir.

Q. You have already testified that you were in charge of the section crew at Cloverton?

A. Yes, sir.

Q. At the time of Mr. Moquin's injury?

A. Yes, sir.

Q. Do you remember that there was a crossing over the house track that was used in hauling pulpwood at that time?

A. Yes, sir.

Q. And where was that crossing, the crossing so used?

A. Well, there was a team crossing just south of the warehouse, going across the house track, or otherwise north of the derailment.

Q. When you say south of the warehouse do you mean south of the rectangle in green?

A. Well, the south end.

[fol. 384] Q. Right at the south end of that?

A. Yes.

Q. And is that the place just described by Mr. Knutson where the ditch was filled up with dirt and things of that kind to make a passing over the ditch?

A. Yes.

Q. Was that the only place that was used as a crossing there?

A. The only place that I could know of.

Q. You are familiar with those cement piers that are out there?

A. Yes, sir.

Q. As shown on the plat Defendant's Exhibit "12"?

A. Yes.

Q. Was that roadway between the cement piers just referred to and the warehouse?

A. Yes.

Q. That is shown on the plat?

A. Yes.

Q. What had those cement blocks been used for, do you know.

A. They evidently had been used for a building.

Q. Was there any part of the building left at the time of the accident?

A. Well, at the rear end of this building there—it seems as though some of the building was left and rubbish and stuff at the west side, the west piers, using ordinary directions.

Q. Will you put a mark on this plat showing just where that part of the building was?

[fol. 385] A. Right in here, about. (Witness indicating.)

Q. The marks that you have put on the plat here now mark a part of the building?

A. Yes, part of the building, rubbish and other stuff, pieces of wood piled up in there. Laid there.

Q. And what, if anything, was along the track between the cement blocks and down to the jammer, down to the loading jammer, to the south?

A. Well, there was pulpwood scattered all along over near, just very near to the jammer. There was a little clearance in between the jammer, scattered along in there.

Q. Is it your testimony that there were piles of pulpwood all the way from the jammer up to the cement blocks?

A. Very near from the jammer. Well, a few feet.

Q. A few feet from the——

A. From the jammer.

Q. There was a sort of a pulpwood yard there?

A. Yes.

Q. About how high was that pulpwood piled there, would you say?

A. Oh, it wasn't so awful high; about two feet in that neighborhood.

Q. And was it that high all the way down to the concrete pier?

A. Yes, just about. I didn't measure it. I don't know.

Q. It was that way at the time of the accident, was it?

A. Yes.

[fol. 386] Q. And what, Mr. Raasch, would you say was the height of the part of the old building that was left there at the time of the accident?

A. Well, I couldn't tell you. It was quite high. I don't know exactly how high it was.

Q. Well, would it have been possible for a team to go through it or over it?

A. No.

Cross-examination.

By Mr. Davis:

Q. Mr. Raasch, do I understand you now to state that after this accident you examined these rails and found all six marks there?

A. Yes, sir.

Q. Will you state that they had never been there before this accident?

A. They had never been.

Q. Before the accident?

A. Before the accident, no.

Q. You are sure of that?

A. Yes, except a few—not these marks.

Q. No, these marks I am speaking of?

A. No.

Q. You are sure now that none of these six marks that you pointed out yesterday were on any of these rails before the accident, that is true, isn't it?

A. Well, now, just wait a minute. Before the accident there was no other marks on them rails besides the slipping of the engines, not those marks.

Q. No, I am speaking of these.

[fol. 387] A. No, those marks.

Q. Now, there are no other marks on these rails now, are there, there weren't yesterday afternoon any other marks than these six marks on those rails?

A. Except some slipping of the wheel marks that has been there for a long time.

Q. Well, but they are not in this space, are they?

A. Probably not. I don't know just exactly.

Q. That is what I mean. Now, will you now state that none of the six marks you pointed out there were on the top of the rail before the accident?

A. Not that I noticed.

Q. Well, you would have noticed it if there had been?

A. Yes, I say not that I noticed before.

Q. Well, you would say that they were not there before?

A. Well, not in that sense of the word.

Q. Well, what do you mean by in that sense of the word?

A. Well, I never noticed them before.

Q. You had charge of the track and were inspecting the track every day?

A. Yes, sir.

Q. If they had been there you would have noticed them, wouldn't you?

A. Yes.

Q. So it can be taken by the jury that you state positively that not one of those six marks were on any of those rails [fol. 388] before the accident?

A. Yes.

Q. And immediately after the accident you found these six marks on the rail?

A. Yes, sir.

Q. On the 27th of February?

A. On the 27th of February, yes.

Q. All on the rails?

A. All on the rails.

Q. And they showed themselves to be flange marks?

A. Yes, sir.

Q. Where the flange of a wheel had gone over the rail?

A. Yes, sir.

Q. How many trucks did you say when you testified before of the head car of ties went off the rails?

A. One set of trucks.

Q. There are two wheels to a truck?

A. Two wheels to each truck?

Q. And the wheels on the other side——

A. Four wheels to each truck. Of course, if you call them straight across——

Q. Well, two wheels on each side to the truck?

A. Two wheels on each side to the truck, yes, sir.

Q. Now, those are the only wheels of either of the cars that went off the track?

A. No, sir.

Q. What other wheels?

A. Talking in plain terms or directions, the north set of [fol. 389] wheels of the south set of trucks was derailed of that car of ties.

Q. The north set of trucks would be in this direction towards the crossing?

A. North set of wheels of the south set of trucks.

Q. That would be two more wheels?

A. Two more wheels.

Q. Did any other wheels go off the track in the car back of it?

A. Yes.

Q. How many?

A. I ain't positive, but I think it was the first set of wheels.

Q. The first set of wheels of the empty went off?

A. Yes.

Q. You remember that distinctly?

A. Yes.

Q. At the time of this accident, is it not a fact that there is a space running in a line from this corner where a team

could drive over to the track to the south of the crossing and wasn't it there yesterday afternoon, from twelve to fifteen feet wide?

A. There was no space that they could drive there unless they drive through a ditch.

Q. Well, of course, the ditch is there now?

A. Yes.

Q. That ditch was filled with debris and pulpwood and snow that had drifted in there during the winter of 1928, wasn't it? Yes or no.

[fol. 390] A. There was all kinds of stuff.

Q. How?

A. There was snow and wood and they couldn't drive through there.

Q. I didn't ask you that.

Mr. Davis: I ask that that be stricken out as not responsive.

The Court: It may be stricken.

Mr. Davis:

Q. Just answer the question. The ditch in the winter of 1928, when the accident happened didn't look like it did yesterday, did it?

A. Why, there was no snow there.

Q. There was wood and pulp and debris in that ditch practically to the top of the ground there in 1928, that winter, isn't that true?

A. There was what?

Q. Pulpwood and debris in that ditch practically to the top of the level of the ground there in the winter of 1928?

A. It was higher than the level of the ground.

Q. It was higher than the level of the ground, and that was covered with snow at the time of the accident, wasn't it?

A. Yes.

Q. And it had drifted in there?

A. Yes.

Q. And it was covered with snow at least a foot to a foot and a half, wasn't it?

A. Yes.

Q. Would you say two feet or three feet that had covered over with drifts?

[fol. 391] A. Well, my statement was between fourteen and twenty-four inches where the derailment happened.

Q. And that snow was hard snow that had drifted in loosely before the melting and the accumulation of snow up to February, 1928, wasn't it?

A. It wasn't hard snow.

Q. Did you go over it at any time after the accident?

A. Yes, sir, over it every day.

Q. Your feet went in?

A. Yes, sir.

Q. How far would you say you sunk down before the accident?

A. I couldn't say.

Q. Was it that afternoon or that morning?

A. That afternoon.

Q. You sunk down that afternoon. You are sure it wasn't the next morning?

A. No, sir.

Q. Did you go over there the next morning?

A. Yes.

Q. Did you sink down?

A. Well, I didn't pay any attention then if I did or not because we had been walking around there.

Q. Well, do you think you did?

A. Well, I don't know.

Q. Well, you do know that it froze and went to seven degrees below zero, so that you couldn't have sunk down [fol. 392] there if it froze that hard, the next morning, isn't that true?

A. Well, it is deep snow.

Q. That was the condition of the ditch at the time of the accident, that it was filled with debris and pulpwood above the top of the ground and then some twelve or fourteen to twenty-four inches of snow on top of that?

A. Yes.

Q. You saw these teams working, did you, at different times?

A. At different times.

Q. Did you not see teams cross both at where this blue marking is and also turning and going down across the tracks and going up the tracks, in loading? Did you not see that?

A. Saw them come across the tracks, but not going in the tracks.

Q. I will ask you if you did not see them come across the tracks and turn and go across the tracks both to the south and the north of this crossing?

A. After they come across the crossing?

Q. Yes, they would turn and they would drag their whipple-trees and they would drag snow?

A. Not in between the tracks; in between the house track and the passing-track.

Q. Well, you would not say they never crossed over any part of the rails there to the south or north of this crossing?

A. No, sir, I never seen them.

Q. Don't you know, as a matter of fact, that with the whipple-trees and driving there they would drag snow both [fol. 393] to the north and south of this crossing at various times? You would not say they didn't, would you?

A. Well, I wouldn't say they didn't because——

Q. Well, that is all I asked you. Isn't it a fact that there was a driveway some twelve feet south, in the winter time over this debris and snow, south of this crossing that winter?

A. No, sir, there was no driveway.

Q. And isn't it a fact that Mr. Brewer came to you about five days before this accident and told you where it was and asked you why you didn't remove the snow and ice?

A. I don't recollect that he mentioned that to me.

Q. Well, you would not state under oath that you did not meet him at the depot and that Mr. Brewer said to you, "We can't remove these cars because of ice and why isn't the ice removed?" and did you not answer, "I am not loading wood," or words to that effect?

A. No, sir, I never answered that I am not loading wood.

Q. What did you answer?

A. I never recollect that I talked with him.

Q. You don't recollect of ever talking with him?

A. I don't recollect that I ever answered him or talking to him in any such way.

Q. You won't say you didn't, will you?

A. Well, I might have, but not according to snow. I might have talked of something else to him, but——

Q. He never mentioned snow or ice to you?

[fol. 394] A. Not that I recollect.

Q. During that winter he never mentioned snow or ice to you?

A. Not that I know of he never mentioned it.

Q. Will you state that you positively know that he never mentioned ice at the point of derailment or near it?

A. I don't recollect that he ever did.

Q. But you won't say he did not?

A. Well, I won't say he did not because I——

Q. No.

A. I never recollect of ever hearing him say it.

Q. Now, Mr. Raasch, how long before this accident had you been down to this crossing, how many days?

A. I was through on a Saturday and on a Monday morning before this accident. We shoveled out the crossings, cleaned out the crossings, and I walked up to this other crossing and there was no snow there to remove.

Q. Well, this crossing here?

A. Yes.

Q. This temporary crossing?

A. Yes.

Q. Now, is it not a fact that at that time there was ice over both rails of the track an inch and a half to two inches?

A. No, sir, there was no ice.

Q. You are positive now that—you heard Mr. Brewer on the stand, did you not?

A. Yes, sir, I did.

Q. Heard him testify that the ice was an inch and a half [fol. 395] to two inches over the rails of the track?

A. Yes, sir.

Q. And you say that there was no ice at all there?

A. There was no ice over the rail at all.

Q. Nor any snow that morning?

A. Not at the crossing.

Q. No, the rails were perfectly clear? There was no pulpwood or shavings or trimmings or anything over those tracks?

A. No.

Q. No, sir. Nor there wasn't, and you would say that there wasn't, any ice or snow, as I understand you, over the tracks at any point south of the crossing?

A. Snow?
Q. Ice?
A. Ice?

Mr. Boyle: You said ice or snow.
Mr. Davis: I will take the snow back—ice?

A. There was no ice over the rails south of the crossing.
Q. By ice I mean what was defined to the jury as ice, water that is frozen?
A. Yes.
Q. Is it not a fact that sometime previous to this accident other cars had been derailed in the vicinity of these red marks, isn't that true?
A. I don't know.
Q. Don't you know that you helped rerail a car that had been derailed, will you say you did not, in the presence of [fol. 396] Mr. Herman Otte, I think his name is, and other people there at Cloverton?
A. Rerailed a car?
Q. Yes, sir, rerail a car that was derailed before this accident?
A. No, sir, I never did.
Q. You are sure of that?
A. Yes, sir.
Q. Would you say that no car was derailed at this point?
A. It might have been before my time or it might have been that I never seen it.
Q. When were you there?
A. Nobody ever mentioned it to me.
Q. I say when did you go to work there, Mr. Raasch?
A. Well, my books I left up at Cloverton at that time when I left. I couldn't tell you the exact dates or anything like that.
Q. Oh, about when?
A. I come there in January.
Q. Of 1928?
A. 1928.
Q. So you don't know anything about the conditions before January, 1928, there?
A. No.
Q. And you left when?
A. Oh, that was later on in the spring, about three months, four months; between four and five.

[fol. 397] JAMES L. BREWER, re-called by defendant for further cross examination, testified as follows:

Cross-examination.

By Mr. Fryberger:

Q. Mr. Brewer, in your testimony you mentioned the old Golmo warehouse, do you remember?

A. Yes, sir.

Q. Who was Golmo?

A. John Golmo was a pulpwood dealer and he dealt in pulpwood, groceries and different kinds of merchandise.

Q. Did he own the warehouse?

A. Yes, sir.

Q. Was that warehouse torn down since the accident?

A. That warehouse was tore down the next spring.

Q. After the accident?

A. After the accident, sir.

Q. And how close was that warehouse to this roadway that went by the Golmo warehouse, this old crossing?

A. You mean the old crossing?

Q. Yes, I am talking about this crossing that went by the Golmo warehouse; how close was the road to the warehouse, the Golmo warehouse?

A. The crossing we used or the old one?

Q. Well, you can call it the old crossing if you want to.

Mr. Davis: Well, he is asking you which one you mean.

[fol. 398] Mr. Fryberger: I am talking about this crossing that is marked on this map. Withdraw that. Was the Golmo warehouse to the northerly of, we will call it, new or old crossing?

A. It was north of the old crossing.

Mr. Fryberger: That is all.

Mr. Boyle: Would you say that this rectangle in green on the plat shows the approximate location of that Golmo warehouse?

A. It is very close to it, sir.

Q. Then I am going to mark that Golmo warehouse. Is that the way to speel that name, G-o-l-m-o?

A. I believe that is——

Q. The rectangle that is marked Golmo Warehouse you agree that is about the correct location for it?
A. That is about the correct location.

GUST JOHNSON, called on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Where do you live, Mr. Johnson?
A. Minneapolis.
Q. What is your business or occupation?
A. Roadmaster.
Q. For the Soo Line?
A. Yes, sir.
Q. And how long have you held that position?
A. Twenty-one years.
[fol. 399] Q. Is Cloverton in your district?
A. Yes, sir.
Q. You are familiar with the situation at Cloverton, are you?
A. Yes, sir.
Q. Were you down there at the time of the derailment of the car, when Mr. Moquin was injured? I do not mean when ths car was derailed, but some time after that?
A. Yes, the following day.
Q. When you got to the scene of that accident, had that car been re-railed?
A. No, sir.
Q. So that you saw it there?
A. Yes, sir.
Q. You also went down to Cloverton with us yesterday, did you?
A. Yes, sir.
Q. And you saw the steel, the rails, that are there on the house track?
A. Yes, sir.
Q. Shown here on this plat?
A. Yes, sir.

Q. Are those the same rails, in exactly the same positions as they were in at the time of the accident?

A. Exactly.

Q. When you were down there before the car was re-
[fol. 400] railed, did you notice whether there was any ice over the rails or anywhere up close to the top of the rails?

A. There was no ice.

Q. How often do you go through Cloverton or stop off there?

A. Oh, I go through there about three times a week; stop over once a week, or so.

Q. Did you notice while you were down there that there was a wagon crossing over the house track?

A. Yes, sir.

Q. Or a sleigh crossing, was it?

A. Yes, sir.

Q. Was that the crossing being used that winter to haul pulpwood from one side of the track, from the west side of the track, in between the house track and the passing track?

A. Yes, sir.

Q. Just where was that crossing, Mr. Johnson?

A. It was north of the depot on the house.

Q. Are you familiar with the location where those cement blocks are out there?

A. Yes, sir.

Q. Did you also know where the Golmo warehouse was?

A. Yes, sir.

Q. Where was that crossing with reference to the cement blocks and the Golmo warehouse?

A. It was just north of the cement blocks.

Q. And that would be just south of the Golmo warehouse, then?

A. Exactly.

[fol. 401] Q. In between the two?

A. In between the two, yes.

Q. Was there any other crossing anywhere along that house track, excepting the main line crossing?

A. No, sir.

Q. Or any other place that had been used as a crossing over those tracks, excepting this crossing between the cement blocks and the Golmo warehouse?

A. No, sir.

Mr. Fryberger: Mr. Boyle, you said the main line crossing, you meant the street crossing?

Mr. Boyle: Yes, I meant the street, Main street crossing.

A. No, sir, there was no other crossing.

Q. What was south of the cement blocks, Mr. Johnson, at the time of this accident?

A. There was pulpwood piled all along there.

Q. How far to the south was that pulpwood piled?

A. Away down to the building south of there.

Q. Do you remember, Mr. Johnson, anything about whether or not there was any part of the building on those cement blocks?

A. Yes, there was a part of the building.

Q. Was that there at the time of the accident?

A. Yes, sir.

Q. And had that been there during all of that winter?

A. Yes, part of the winter.

Q. It had been there all winter, at least up until the time [fol. 402] of the accident, is what I am getting at?

A. Yes, sir.

Q. At the time that you were there before this car was re-railed, was there anybody with you?

A. Yes.

Q. Who was that?

A. The conductor, Mr. Kline.

Q. Mr. Kline was the conductor, you say?

A. He was conductor on train 60 and 61.

Cross-examination.

By Mr. Davis:

Q. Who was there besides yourself that morning? The next morning, I mean.

A. I wasn't there in the morning.

Q. What time, please?

A. Three-thirty in the afternoon.

Q. That was the second day after the accident?

A. The next day after the accident.

Q. Who was there besides you?

A. Mr. Kline.

Q. Anybody else?

A. No, sir.

Q. Is that the only time you were there until yesterday?

A. Yes, sir.

Q. The claim agent wasn't there?

A. Not that I know of.

Q. Do you know the claim agent? What is that claim agent's name?

A Voice: McCarthy.

[fol. 403] Q. Was he there?

A. When?

Q. The day after the accident, the gentleman who just stood up?

A. He might have been. I don't remember him.

Q. You are an official of the company, I believe?

A. Yes, sir.

Q. And when you hear of an accident, a part of your duty, of course, is to go to the place of the accident?

A. Yes, sir.

Q. As an official of the company, it is your duty to investigate the causes of accidents?

A. Exactly.

Q. It is your duty to make every investigation and get all of the information you can for the company?

A. Yes, sir.

Q. It is your duty not only on the day after this accident, but after any accident, to get all the facts as quickly as you can before they are lost as to what the situation is at the accident?

A. Yes, sir.

Q. That was your duty that day?

A. Yes, sir.

Q. It was your duty to get all of the facts that you could, showing the situation there where the accident occurred?

A. Yes, sir.

Q. You didn't measure these distances that day, did you?

[fol. 404] A. What distances?

Q. Did you measure any distances?

A. No.

Q. You didn't take any photographs to show the condition of the place at the time of the accident?

A. No, sir.

Q. You could have taken a photograph the day after the accident which would clearly show the condition of the track, the amount of snow on it and where the roads went and everything, couldn't you?

A. That is not my business.

Q. I say you could have taken it?

A. Well, no, I couldn't. I ain't got that kind of instruments.

Q. But you could have gotten a camera or have had someone take it for you, couldn't you?

A. Well, as I say, that is not my business.

Q. Your business is to see that the section men do their duty?

A. Exactly.

Q. And your business to see that the section men keep ice off the tracks, isn't it?

A. Yes, sir.

Q. You heard Mr. Brewer and Mr. Burden and Mr. Halsted on the stand?

A. Yes, sir.

Q. Heard them testify to that ice being over the top of the rails an inch and a half or two inches thick?

A. I heard it, yes, sir.

[fol. 405] Q. The same day and the morning following. Now, had the track been cleared out when you got there that afternoon?

A. It was partly cleared off.

Q. Well, had the tracks been cleared off where the teams had gone there?

Mr. Fryberger: Where? What are you talking about?

Mr. Davis: Right here where the teams had gone over.

Mr. Fryberger: Where are you pointing to? May it please the court, there is no evidence that teams went over that place.

Mr. Davis:

Q. Well, you say you saw the crossing where teams had been using, had the crossing where you saw the teams had gone over been cleaned off that afternoon?

A. There was no snow on the crossing.

Q. There was no snow on the crossing?

A. At the place where the teams went over.

Q. I thought you stated in your direct examination that it had been cleaned off, did you not, at three-thirty the next afternoon?

A. There was no teams crossing.

Q. Well, of course, not that particular minute, but had the rails and the snow or whatever had been there been shoveled off before you got there at three-thirty that afternoon?

A. Oh, the snow was shoveled off all around the car so as to re-rail the car.

Q. How far to the north of where the car was derailed [fol. 406] would you say the snow or ice had been shoveled off?

A. There was no ice to be shoveled off. It was snow.

Q. All right, snow; how far to the north of where the car had been derailed would you say the snow had been shoveled off?

A. I should imagine ten or fifteen feet was shoveled all around the car.

Q. Was it shoveled off any more than ten or fifteen feet to the north of the car?

A. No, sir.

Q. And there was nothing to indicate there was any snow there?

A. No, sir.

Q. This remains of this old building, how high would you say it was?

A. I never measured.

Q. I know you didn't measure it, but have you an idea? Was it eight or ten feet high?

A. About that.

Q. Eight or ten feet high. And it was all boarded up?

A. Yes, sir.

Q. And did you notice drifts where these marks were, of snow, to the side of the track?

A. There was snow all along there, yes.

Q. Had the snow drifted where these red marks are, to the side of the track?

A. Yes, sir, there was drifts on both sides.

Q. There were no drifts, of course, in between these two spaces over here over the old crossing?

[fol. 407] A. Between the two warehouses, you mean?

Q. Between the two warehouses, there were no drifts there?

A. No, there was no snow there to speak of.

Q. Well, no drifts, I say?

A. Well, I didn't notice in between the warehouse. I just attended to the tracks.

Q. Where you noticed the drifts was where this building stood up eight or ten feet and protected the track, that is where you noticed the drifts, wasn't it?

A. Well, the drifts were on the track.

Q. Well, I will ask you, then, isn't it a fact that the snow there was drifted both on this west side of the track, up this way? I am correct, am I not, Mr. Boyle?

Mr. Boyle: What is that?

Mr. Davis: Upward is west?

Mr. Boyle: Yes, upward is west on this plat.

Mr. Davis:

Q. Now, is it not a fact that snow was drifted in all along from where you see this red mark, which is No. 6, over practically to the old crossing, that the snow was drifted in there above the top of the rails and some two or three feet above the rails to the west of the house track?

A. Well, there was some uniform snow drifts all the way through there.

Q. Uniform what?

A. Uniform snow drifts, snow drifts all the way through there.

Q. Was that a hard snow drift?

[fol. 408] A. Well, it was hard the day I came there. That was the day after.

Q. And about how high would you say it was above the top of the rail to the house track, that drift?

A. Oh, about from eighteen to twenty-four inches.

Q. Eighteen to twenty-four inches above the top of the rail?

A. Yes.

Q. And that snow had drifted in, as I presume you would say, during the winter from different snow falls and blowing in there?

A. Exactly.

Q. It was not just a snow fall that had fallen lately and just filled this up, was it?

A. Well, it had snowed quite a bit previously and had drifted and drifted in there.

Q. Yes.

A. During the night.

Q. There was more drifting, then, as I understand you, in this space between No. 6 red mark and the south end of the crossing, there was more drifting in there than there was over to the north here? It was drifted higher here than it was here (counsel indicating on Defendant's Exhibit "12")?

A. Yes.

Q. Or was it the same?

A. There was more snow there, yes.

Q. A bigger drift?

A. Yes.

[fol. 409] Q. Higher above the rails?

A. Exactly.

Redirect examination.

By Mr. Boyle:

Q. Mr. Johnson, so far as the ground is concerned, now, I am not talking about some possible piece of pulpwood or something of that sort, but so far as the ground is concerned, and the track and everything, is the situation at Cloverton now exactly as it was at the time of the accident?

A. Exactly the same.

Q. Without the snow, of course?

A. Exactly the same.

Recross-examination.

By Mr. Davis:

Q. Mr. Johnson, this snow which had drifted in, completely filled the ditch, didn't it?

A. Yes, it filled up the ditch.

Q. And went up over the ditch about two feet?

A. Oh, I don't think it was that deep.

Q. Above the top of the rail?

A. I don't think it was that deep.

Q. I understood you to say two feet.

A. About that.

Q. I understood you to say this drift was about two feet high. Out in the ditch to the west of the rails of the house track—that is what I asked you—you said it was two feet high, in here between these red marks where this building protected it, did you not?

[fol. 410] A. Just about.

Q. And then, if it was two feet above the rail, why, of course, it filled this ditch entirely and went above the surface of the ground?

A. Yes.

Q. Didn't it?

A. Yes.

Q. Of course, you couldn't see down under the snow where it was drifted there?

A. Certainly not.

Q. And you don't know how much wood or pulp or anything had been filled in there or been thrown in there, do you? You don't know that?

A. There was no pulpwood in the ditch. The ditch was cleaned from pulpwood, but there was pulpwood piled all along the track there.

Q. When was the ditch cleaned from pulpwood?

A. We clean it every spring and every fall.

Q. After the fall, when they went to working there, you don't know how much pulp had accumulated in the ditch before the snow came, after it was cleaned? You were not there, were you?

A. There couldn't be any pulpwood because I went through there twice with the bulldozer.

Q. When?

A. Two or three times and it swings out five feet.

Q. Well, when was that?

A. Why, I haven't got the exact date.

Q. Well, what month, January, March?

A. Oh, it was December and January and the first part [fol. 411] of February or so. I went through there three times.

Q. You say the first part of February, about when in February?

A. Well, about the first week or so, I think it was.

Q. Was the snow in the ditch at that time in drifts?

A. Well, there was more or less snow, but the bulldozer regulates to take care of that.

Q. But it didn't take care of the drifts and tear them away?

A. Oh, yes, it did.

Q. How far?

A. Five feet, six inches.

Q. Now, did it tear out the snow from the ditch and tear it out so it left the ditch in there?

A. Throwed it all up.

Q. What is a bulldozer?

A. It is special equipment made for dozing out snow on the sides of the track and also in the center of the track.

Q. How does it run?

A. Runs by special train.

Q. Yes, and it has a flange?

A. Flange underneath and wings on the sides.

Q. That sets down close to the top of the rail?

A. Yes, sir.

Q. And then, it acts really as a snow plow?

A. Acts as both, snow plow and flanger, both.

Q. Now, then, does that set below the rails?

A. In the center, yes.

[fol. 412] Q. But I mean on either side of the rails, outside, is it made so it angles down or is it a straight piece?

A. Straight piece, straight out on the outside.

Q. Yes, so that when you operate that bulldozer if these two pencils were the track and your bulldozer is operating, it would run along slightly above the rails, it would not scrape on the rails, would it?

A. On the outside it does, but on the inside it cuts down three inches below the foot of the rail.

Q. Between the rails?

A. Yes.

Q. Yes, in between the rails it cuts down three inches, but on the outside it would be on line slightly above the rails as it went along on top of the rails?

A. Yes, sir.

Q. It would not scrape on the rail?

A. No. It would level off the top of the rail.

Q. Just enough so it would not come in contact with the rails, but would brush the snow off?

A. Yes, sir.

Q. And that is all you did with the bulldozer?

A. Yes, sir.

Q. So you did not have any other flange that went over and extended beyond the rail that dug out the ditch, did you?

A. No, but it dug out the snow in the ditch level with the top of the rail.

Q. So there was snow, then, from the top of the rail down to the bottom of the ditch when you did that bull- [fol. 413] dozing down there during that winter?

A. Well, it was level ground.

Q. Yes, it would make a level space, but below that there was snow? That is, after your bulldozer had gone over it would still leave snow down in the ditch?

A. Oh, yes, there would be some snow in the ditch.

Q. And that was so all winter, wasn't it?

A. Yes.

Q. There was considerable snow in December and January, wasn't there?

A. Oh, we had lots of snow, yes.

Q. With that snow covering the bottom of the ditch, you do not mean to tell the jury you could tell what was underneath the snow, do you?

A. The snow was laying on top of the ground. It was——

Q. But I say you couldn't tell what was beneath that snow?

A. Yes, I could.

Q. Will you now state that that ditch was not filled with pulpwood under the snow in the ditch that winter and every other winter?

A. Well, if it was, it was very little.

Q. Do you know how much?

A. Well, if there was anything it was just below the level of the wing.

Q. Yes.

A. Below the level of the rail.

Q. How deep was that ditch?

A. Oh, about eighteen inches.

[fol. 414] Q. Eighteen inches, isn't it deeper than that?

A. Well, I didn't measure it.

Q. You saw it yesterday.

A. Yes, sir.

Q. Would you state that in some places it is not over two feet deep, that ditch, below the top of the rail?

A. I didn't measure it.

Q. Would you say now that it is not over two feet deep from the top of the rail to the bottom of that ditch, as you saw it yesterday?

A. That might be.

Q. That two feet was filled with snow after your bull-dozer went by, of course, from the level of the top of the rails down to the bottom that ditch was filled with snow, or something?

A. Yes.

Q. You couldn't tell, then, in the winter-time when it was filled with snow how much pulp or wood was under the snow, could you?

A. Yes, sir.

Q. Had you ever been called to Cloverton at any time previous to this occurrence?

A. No, sir.

Q. Where there had been a derailment of a car at or about the place where this car was derailed?

A. No, sir.

[fol. 415] R. T. Campbell, called on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Where do you live?

A. Brainerd.

Q. How long have you lived in Brainerd?

A. Twelve years.

Q. What is your business or occupation?

A. City engineer of Brainerd.

Q. How long have you been city engineer?

A. Since 1917.

Q. Are you the Mr. Campbell referred to by Mr. Knutson who went out to make some measurements at Cloverton?

A. Yes, sir.

Q. This plat, Defendant's Exhibit "12," was made by you and Mr. Knutson?

A. Yes, sir.

Q. Were you in the court room when Mr. Knutson gave his testimony regarding this plat and the measurements?

A. Practically all the time.

Q. You have seen these distances that were put on the plat by Mr. Knutson after the plat was produced in court?

A. Yes, sir.

Q. And you agree with him that these are the correct distances?

A. Yes, sir.

[fol. 416] Q. You heard Mr. Knutson explain that the outline of the Golmo warehouse was made by stakes being put in there for the corners?

A. Yes, sir.

Q. That Golmo warehouse is properly located there, is it?

A. Yes, sir.

Q. The cement blocks that are shown at this place—I am going to mark that "cement blocks." These little green squares at the place on the plat that I have marked "cement blocks" are properly located, are they?

A. Yes, sir.

Q. And the marks along the track are also properly located on this plat?

A. Yes, sir.

Q. As well as the station platform?

A. Yes, sir.

Q. During recess you and Mr. Knutson called my attention to some stakes that had not yet been put on your plat, what were they?

A. Those were stakes outlining the ditch in the vicinity of the crossing.

Q. This plat was just finished immediately before court convened this morning?

A. Yes, sir.

Q. You and Mr. Knutson were making it down in the office?

A. Yes, sir.

Q. Have you the information necessary to put those stakes on the plat? Can you do that for us, please?

[fol. 417] A. Yes, sir.

Q. Just do that for us.

A. Measuring along the south line of the present crossing I find that the present ditch is eight feet from the center line, eight feet from the center line to the east side of the ditch.

Mr. Davis:

Q. That is from the center line of the track?

A. Yes.

Q. Just locate your stakes on there and then we will have you explain it, Mr. Campbell. What do the marks and the figures that you have put on that plat indicate?

A. The marks indicate the intersection of the east and west line of the ditch that exists there with the south line of the crossing, in other words, the mark where the present crossing is in place across the so-called ditch.

Q. Then, from the center of the track to the east side of the ditch is what distance?

A. 8.1 feet.

Q. From the center line of the track to the west side of the ditch is what distance?

A. Twelve and a half feet.

Q. And what, then, is the width of the ditch?

A. 4.4 on top.

Q. Now, take the witness stand. While we are on that ditch, did you make some measurements of the ditch yourself? I neglected to ask Mr. Knutson about that.

A. Yes.

Q. Give us those measurements, please.

[fol. 418] A. Side ditch, four to five feet wide on the top, two feet on the bottom. Bottom is 1.6 feet below top of rail of house track.

Q. Will you give that again, please, the last, 1.6 feet?

A. 1.6 feet.

Q. What is 1.6 feet?

A. One and six-tenths feet.

Q. From where?

A. From the top of the rail of the house track.

Q. To where?

A. To the bottom of the ditch. That is, measured perpendicularly.

Q. You know what is on the plat and what I asked Mr. Knutson about. Is there any other measurement that you men took that I haven't inquired about?

A. The center line of the ditch is 10.8 from the center line of the house track, measured west.

Q. Is there any other measurement that you have there?

A. I think they are all on there now.

Cross-examination.

By Mr. Davis:

Q. You state this point to the west, as you measured it, would be the outside or west side of the ditch?

A. Yes, sir.,

Q. Does it run practically, then, in a straight line to the south?

A. Yes, sir.

[fol. 419] Q. So that you would state that all of these cement blocks are in the ditch?

A. The front row.

Q. Yes, these that I have mentioned, the ones nearest the track?

A. The ones nearest the track.

Q. How far down in the ditch are these cement blocks?

A. You refer to the depth below the bottom of the ditch?

Q. Below the top of the ditch?

Mr. Boyle: Where is the top of the ditch?

Mr. Davis:

Q. I will ask you, where is the top of the ditch? You recollect where the top of the ditch is?

A. Yes, I do.

Q. From your own knowledge, how far below the top of the ditch would you say these cement blocks are, how far do they extend below the top of the ditch?

A. The whole size of the cement blocks or the difference between the top of the ditch and the top of the cement blocks?

Q. No, I mean how far down from the top of the ditch down towards the bottom of the ditch do the cement blocks next to the railroad track extend?

A. About a foot.

Q. Is the top of the cement blocks above the top of the ditch?

A. I haven't the measurement giving that, but it seems to me that the top of the ditch and the top of the cement [fol. 420] blocks are about the same.

Q. The top of the cement blocks, as you would say from being down there yesterday and measuring this, did not extend above the top of the ditch?

A. I couldn't say exactly. I can refer you, though, to the top of the cement blocks above the top of the rail of the house track.

Q. I will come to that in a little while. I am asking you now whether when you were down there yesterday these two cement blocks standing up and the one leaning over a little—whether the tops of those blocks extend above the top of the ditch?

A. Yes.

Q. How far?

A. Oh, three or four inches.

Q. How high are those cement blocks?

A. I didn't measure the depth.

Q. If they extend a foot below the top of the ditch and three or four inches above, they would be fourteen inches in height, wouldn't they?

A. Yes, sir.

Q. Would you now state that any of those cement blocks are that high?

A. They must be higher than that, because they extend into the ground.

Q. I mean from the top of the ground. I am not speaking of down in the ground, but would you say that the part of the cement blocks extending above the ground are fourteen inches high?

A. Measuring from that portion of the ditch in which they are in.

[fol. 421] Q. Measuring from the top of the ground?

A. I should say in that neighborhood.

Q. And a foot of each of those cement blocks is down in the ditch, as I understood it?

A. Approximately.

Q. These two cement blocks don't stand up on the ground away from the ditch, just at the edge, do they, and they form no part of the ditch?

A. They are in what was the ditch, all right.

Q. The ground around those cement blocks—is that on a level with the rest of the ground running to the west?

A. No, it isn't.

Q. How far below, would you say it was? How far below the ground running to the west?

A. About a foot.

Q. You stated that you had a measurement of the top of the cement blocks as compared with the top of the rail of the passing track or the house track, is that the west rail, the rail nearest the ditch?

A. It was a line.

Q. Yes.

A. Using both rails.

Q. Well, how high above the rail was that?

A. .2 of a foot.

Q. That would be an inch and how much?

A. That is two and a half inches.

Redirect examination.

By Mr. Boyle:

Q. Mr. Campbell, there are three cement blocks on De-
[fol. 422] fendant's Exhibit 12, which are in a row running north and south and that is the easterly row of the cement blocks, that is right, isn't it?

A. Yes, sir.

Q. When you speak about the cement blocks being in the ditch do you refer to that row of cement blocks?

A. Yes, sir.

Q. Those three blocks?

A. Yes, sir.

Q. What about the other cement blocks that are shown on the plat, are those in the ditch?

A. No, sir.

Q. Or do they extend above the ground?

A. They extend above the ground.

Q. How far above the ground do they extend?

A. Two to three inches.

Q. What point do you take there in figuring two to three inches, what do you take as the base for the ground there?

A. The general level of the ground. It is practically level as far as my recollection goes.

Q. Is it your idea that the part of the cement blocks that was exposed was just two or three inches above the level of the ground?

A. Those that aren't in the ditch.

Q. Those that aren't in the ditch?

A. Yes, sir.

J. B. KELLY, re-called on behalf of defendant, previously sworn, testified as follows:

[fol. 423] Direct examination.

By Mr. Boyle:

Q. Mr. Kelly, you have already been sworn in this case?

A. Yes.

Q. I ask you if you went down to Cloverton with us yesterday?

A. Yes, sir.

Q. You have already testified that you are the general roadmaster of the Soo Line?

A. Yes.

Q. Did you, at my request, make an examination of the marks on the track which are south of the crossing shown on this plat?

A. Yes.

Q. I am going to mark this "crossing," and you found south of the part of this plat which is marked "crossing" some marks on the tracks there, did you?

A. Yes.

Q. While you were doing that did you make some measurements of those marks?

A. I did. I took some notes.

Q. Go ahead and tell us, Mr. Kelly, where those marks were located and what you found about each one of the marks. If you have your notes with you, you may refer to your notes.

A. Yes, I have just a rough sketch here or rough notes on that. I made the examination of the marks on what would be called the north rail there.

Q. Well, now, wait a minute. When you say north rail you are using the railroad directions?

[fol. 424] A. The time table directions or railroad.

Q. But so far as the points of the compass are concerned you are talking about the west rail of the house track?

A. West rail, yes.

Q. When I mention the west rail of the house track I mean the rail which is farthest away from the depot.

A. Yes.

Q. So that we won't have any confusion on those directions.

A. I made an examination of the marks on the head of the rail at this location yesterday and from my experience in investigating derailments, circumstances, marks and abrasions on the rail, I found that the indication of these flange marks or the indication of these marks showed that they were flange marks of a car.

Q. Go ahead and tell us what else you found in connection with those marks?

A. And the evidence of these marks, from my experience, would be, taking them from south to north, we first find a flange mark over the rail at a distance of approximately thirty-nine feet from the south side of this crossing, just indicated, commencing about the center of the head of the west rail and extending in a parallel and diagonal manner for two feet, indicating that the flange of a wheel got up on top of this rail and commenced this mark about half way in the head of the rail.

Q. That would be the mark farthest to the south from the southerly line of the crossing?

[fol. 425] A. Yes.

Q. And what was the length of the mark?

A. About two feet, visible for two feet.

Q. The mark, in your opinion, was made when the flange of a wheel got on top of the rail and must have traveled on top of the rail for a distance of two feet to make that mark, is that right?

A. Yes.

Q. Was there anything else about that mark that you found?

A. The other point about that mark is in the circumstances there it may have been, should have been, the first derailed wheel.

Q. Was the general direction of that mark straight along the track or did it go diagonally across the track?

A. For a distance parallel and then diverging to the west, continuation of the mark parallel and diagonally.

Q. Off to the same side of the track that the car was derailed on?

A. Yes, sir.

Q. Was there anything else about that mark?

A. That gave an indication of a derailed wheel.

Q. If you have told us what you found about that mark we will take the next mark then from the south, traveling north.

A. Traveling north the next mark would be approximatel eleven feet and one inch. The indication there is a diagonal flange mark over the head of the rail, extending about seven inches long.

Q. What did you say to start with—eleven——

[fol. 426] A. Eleven feet, approximately eleven feet from the south mark.

Q. Well, the engineer has marked here a distance from the southerly line of the crossing out to a mark approximately twenty-seven feet.

Mr. Davis: That would be correct. He is subtracting the other way from No. 6. No. 5 is eleven feet.

A. I was just working from south to the north.

Q. Oh, I see.

A. Following the direction of the indication of the flange mark.

Q. Then, in order that there may be no confusion, you start down here at the mark on the track farthest to the south?

A. Farthest to the south.

Q. You found that to be approximately thirty-nine feet from the south line of the crossing?

A. Of the crossing.

Q. Then from that point to the north you found another mark what distance?

A. About eleven feet.

Q. So that between the fifth mark and the star is a distance of eleven feet approximately?

A. Approximately. And that mark being seven inches in length across the rail diagonally indicates——

Q. Crossing the rail diagonally in what direction?

A. In a direction from south to north.

Q. In a direction——

[fol. 427] A. And to the west, westerly direction from south to north.

Adjourned to 1:30 o'clock P. M. of the same day, Thursday, May 23, 1929.

Reconvened at 1:30 o'clock P. M. on Thursday, May 23, 1929.

J. B. KELLY, called on behalf of defendant for further direct examination, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Go ahead.

A. And the next, the third mark on the head of the rail from the south is indicated at a point eleven feet north of the last or second mark and this mark is diagonally across the head of the rail from east to west or from south to north and in a westerly direction. This mark is not the mark—the indication doesn't show that it is a flange mark, but it is a mark that is usually made by a column bolt or the truck of the car.

Q. You will have to explain that a little more fully?

A. In other words, it is simply a part of the truck, the lower part of the truck, as a rule, that makes marks of this kind over the head of the rail. It is an abrasion in the rail and does not conform with a flange mark. That is the third mark from the south to the north.

Q. Just what part of the truck would come in contact with the rail to make that mark?

[fol. 428] A. It would be the part of the truck projecting below the axles of the truck, in fact, that unites the two pairs of wheels of the truck and it would be the frame that projects to some extent, within possibly, ordinarily within about four inches or some such matter above the rail when the car is in normal position.

Q. Would that part of the truck come in contact with the rail? It would not, apparently, when the car was in normal position?

A. No, that would be after a truck is derailed.

Q. Was it your opinion that this mark was also formed at the time of the derailment of this car that we are talking about?

A. Yes, that is usually the case.

Q. But it was not the mark that was made by the flange of the wheel?

A. No.

Q. All right.

A. The next indication on the rail is two feet north of the mark just described, which is an indication of the flange of a wheel and twenty-four and a half inches in length, of which mark twenty inches extends along the outer edge of the westerly side of the head of the rail for a distance of twenty inches, and then it takes the head of the rail and crosses diagonally in about four and a half inches, but the indication of the metal from the head of the rail is that it is a movement from north to south and evidently a mark of re-railing the wheel.

Q. You mean with a camel back?

[fol. 429] A. It may be, yes, with the frogs, re-railing frogs.

Q. Just explain that again, if you will, Mr. Kelly.

A. Yes. This mark happens to be in direct opposition of movement to the other marks on the rail. It is running in a direction, according to the metal of the head of the rail that is made in the form of an abrasion, extending from north to south, and for the first twenty inches on outside of the west rail this mark is in contact with the head of the rail and of course parallel to the head of the rail to that extent; then it passes over the head of the rail diagonally in a distance of four and a half inches, and it is evidently the mark of the flange being rerailed over the head of the rail; either with or without camel backs or wrecking frogs.

Q. So that that mark for a distance of twenty inches is shown on the outside of the west rail?

A. The head of the west rail, yes.

Q. You refer to that as a rerailing, that that was made when the car was put back on the track?

A. It is a mark of that kind.

Q. The other marks that you refer to as marks made in derailing when the car was thrown off the track, would be found on the inside of the east side of that westerly rail?

A. Some of those marks are. The first one, however, starts about in the center of the head of the rail.

Q. Right on top of the rail?

[fol. 430] A. Yes. The next evidence in working to the north is fourteen and four-tenths inches from the mark just described and that one is an evidence of a wheel having passed over the rail from the inside or the gauge side of the rail over the head and to the outside, which would evidently be a wheel from the east side of the track, or the east rail, crossing the west rail. That mark is eleven inches in length and gives an indication of the flange barking the gauge side or the east side of the west rail in crossing. That is a diagonal mark also.

Q. You say it gives evidence of the flange barking the inside of the rail?

A. Yes.

Q. What do you mean by that?

A. In following that through you will find the flange of the wheel has set up an abrasion on the inside or the east side of the head of the west rail. It is pitted through there and shows an indication of the flange climbing this rail.

Q. And then the mark extends along the east side of that rail——

A. For a short distance.

Q. —until it finally climbs over the rail?

A. Climbs the rail and the entire indication is eleven inches, that mark.

Q. Let us have the next one.

A. The next one—the next two, I might say they are very closely together and one foot, approximately one foot from the mark just described, of which the first one is very much similar to the last described, being ten inches long and also [fol. 431] an indication of the flange of a wheel coming from the east rail and crossing over this west rail. That mark is ten inches in length and gives the same indication of a flange going over the rail.

Q. And the other mark right with it?

A. The other mark right with it is simply the flange of the wheel passing over the head of this rail in a distance of five inches and that shows no indication on the gauge line as the former two had of an indication of a wheel coming from the opposite rail. That five inch mark passing diagonally

and extending from south to north is the concluding mark on the rails and is very nearly twelve feet from the end of the crossing plank.

Q. This mark that was right alongside of the one that shows an abrasion on the inside of the rail, was that, in your opinion, made in derailing or in rerailing?

A. In derailing.

Q. Then, those two marks were made in derailing, you think?

A. Yes.

Q. I see.

A. I mentioned—I mean to say crossing, the point indicated as the crossing and the point in use as a crossing. There were no planks there. I said planks through mistake.

Q. Well, you don't know whether there were any planks there or not?

A. No, I don't.

Q. I expect to have some evidence on that. You don't know anything about whether there were planks at the [fol. 432] crossing or not?

A. No, I don't.

Q. In referring to the distance that last mark is that you have described to us, did you mean that that mark was twelve feet from the south line of the crossing?

A. Of the crossing.

Q. As shown on the plat?

A. Yes, sir. These marks, seven in all, account for the derailment of one truck entirely and one pair of wheels. The seven marks would include evidence of four wheels of the forward truck and one wheel of the west side of some other truck of a car of that train.

Q. So that if these marks were made in this Moquin derailment and the four wheels of the truck to the north, the northerly truck, had all gone over the track and one wheel of the southerly truck of that car had gone over the track, these marks would account for the five wheels?

A. Yes.

Q. I think you have been in court throughout the trial of this case, Mr. Kelly?

A. Yes.

Q. Is it your opinion that these marks that you have now described were made when the car from which Mr. Moquin fell was derailed?

A. Yes.

Q. And the one mark that you called to our attention do you think was made when that car was rerailed again?

A. Evidently.

[fol. 433] Q. Did you take notice of the rails right at the crossing, whether there were any marks on those?

A. Yes.

Q. And what did you find there?

A. Those marks indicated what we have ordinarily found to be the marks of sled runners.

Q. When you were out there you saw the crossing that is shown on the plat, Defendant's Exhibit 12, did you?

A. Yes.

Q. And was it right at that crossing that you found those marks on the rails?

A. Yes.

Q. And did you find any similar marks either to the south or to the north of that particular crossing?

A. No similar marks.

Cross-examination.

By Mr. Davis:

Q. Is that the first time you had seen that rail—yesterday?

A. Yes, that I remember of.

Q. Do you know whether it had been in there ever since the accident or not?

A. No, I do not.

Q. Do you know when this house track was rerailed?

A. The rail was—from general information that rail was put in there at the time the line was built through there, about 1912.

Q. From the general practice would it be taken out and [fol. 434] new rails put in?

A. No.

Q. On a house track?

A. Not in that traffic or in that locality.

Q. The house track has the least traffic, as I understand?

A. Yes.

Q. So that it would be your judgment that that rail had been there since when, about?

A. Since 1912.

Q. Or sixteen years?

A. Yes.

Q. You would give it as your judgment to the jury that the rail you saw the marks on had been where it was for sixteen years from the general knowledge of your company's business that you have?

A. Yes.

Q. It would be very exceptional to take one of those rails out, wouldn't it, in a house track?

A. It would in a house track. It is done, but it would be exceptional.

Q. You take them out in passing tracks and much oftener in the main tracks?

A. Yes, sir.

Q. You would state, would you not, as roadmaster of the company, that you are reasonably certain that this rail had been there during all that time?

A. Yes.

Q. Now, do you not know that about two years before [fol. 435] there was a derailment on that track, or do you?

A. No, I don't know.

Q. Don't know. You have been with the Soo Line how long?

A. I have been with the Soo Line twenty years.

Q. Yesterday was the first time you ever have examined these marks?

A. Yes.

Q. You never examined them after the accident?

A. No.

Q. Never came out to the place of the accident after it happened?

A. No.

Q. These last marks where there were two close together, they were both flange marks?

A. The last two marks next to the crossing were flange marks.

Q. They were how far apart?

A. Those marks there from the north end of the marks, they were three inches apart. That is commencing from where they left the rail at the north end at the north extremity.

Redirect examination.

By Mr. Boyle:

Q. Mr. Kelly on some of the marks further to the south I understood that where you found derailing marks there was just one mark across the rail and on this last mark, the one farthest to the north, I understood you to say that [fol. 436] there were two marks; how would you account for the fact that there was one mark in one place and two marks here?

A. They are distinct marks of two different wheel flanges, those two marks.

Q. Going off the track in the manner in which the car was derailed when Mr. Moquin was injured, what wheels on the truck would be likely to make the marks five inches apart?

A. The evidence there as I follow it would be that the last mark would likely be the flange of the rear truck of the car.

Q. The last mark; you mean the mark farthest to the north?

A. Yes.

Q. Would be the mark of the rear truck?

A. The forward wheel of the rear truck.

Q. It would be your idea that there would be one wheel of the rear truck passed over the track?

A. Yes.

Q. Passed over the rail. Then, the mark five inches from the last mark would be made by what wheel, in your opinion?

A. That is an indication of a wheel from the opposite side or the east rail, flange coming up in contact with that rail and then crossing over it, and of course that would be evidently a wheel of the forward truck from the opposite side of the track.

Q. So that you think one of those marks was made by a wheel of the front truck and the other one was made by the wheel of the rear truck?

[fol. 437] A. Yes.

Q. Explain what wheels, in your opinion, made the other marks also, if you have worked that out?

A. Yes. Taking the wheel marks, then, from the crossing back?

Q. Your own way.

A. All right, we will indicate them that way—well, I can go back to the back end, to the south end, go back to the south end.

Q. All right. Now, you are starting over here with the mark that is shown by the star on the plat?

A. Yes.

Q. And working northerly?

A. Working northerly. The evidence of the first mark, the southerly mark, is that it is the initial wheel derailed, and that, of course, would be the west wheel of the forward truck. The next mark of seven inches long over the head of the rail would be the second wheel of this forward truck on the west side, just simply mounting the rail. Then we have the two west wheels of the forward truck over this rail. The third mark is an abrasion, it is not the form of an abrasion of a flange mark at all and of course does not apply to the flanges of the wheels and the fourth mark is accounted for in a re-railing operation. The abrasion and everything of that kind is from north to south and does not come in. The fifth mark is the indication of the east wheel of the forward truck crossing this west rail. The next mark in order is an evidence of the second pair of wheels of the for-
[fol. 438] ward truck crossing the opposite or west rail, while the last mark five inches in length diagonally over the head of the rail is an evidence of a pair of wheels of the back truck, the pair of wheels on the west side crossing that rail.

Q. A pair of wheels crossing the rail, as I understand it, just one of those wheels?

A. One wheel, not a pair of them.

Q. Actually passing over the westerly rail?

A. Yes.

Recross-examination.

By Mr. Davis:

Q. Mr. Kelly, getting back to the last marks nearest the crossing, as I understood you, if those were the rails of the track (counsel indicating), there is a mark nearest the crossing on the west rail showing a flange mark, is there not?

A. Yes, two. This would be the rail. We could use this for the west.

Q. I am marking this west or perhaps I can make it this way and call that west. Now, I may be wrong in my directions.

A. Well, we will use the directions we have on here, on the plat here. We have been working on those directions right along. Then you would have your pencil parallel with the railing.

Q. Let me ask you, the plat shows that they are running parallel with the track and the pencils here in front of you are running parallel with the plat?

A. No.

[fol. 439] Q. Aren't they running the same direction the rails are?

A. No, but if you will leave them the way you have them here.

Q. I want to get them so as not to confuse the jury. I am not trying to confuse you. I am just asking you if these rails are running the same as the plat appears from the back of the court house towards the side?

A. Yes.

Q. Yes. So we will call that north and this south (counsel indicating).

A. Yes, that is right.

Q. And that west?

A. Yes.

Q. And this east. I will change the pencils. Now, the last mark which was nearest the crossing, as I understand you, was the mark of a flange going over the rail?

A. Yes.

Q. And did you say it was three or five inches nearer the crossing than the other mark of the flange was?

A. Those marks there figure up twelve feet from the crossing.

Q. But I say how far are they apart, three or five inches?

A. Three inches.

Q. Three inches. Now, it would be your idea that the front trucks of the empty car, the west wheel as well as the east wheel, made those two marks, is that correct?

[fol. 440] A. No, I don't account for the wheels of the empty car.

Q. You don't have any marks that you think the empty car made on the track?

A. No, there is no indication of that.

Q. No indicattion of it. Was it off the track?

A. I understand from the evidence that it was.

Q. But you didn't find that made any mark?

A. No, that is a light car.

Q. Well, then would it be the rear truck of the car of ties that made these two marks?

A. The forward wheel of the rear truck, yes.

Q. Then there were no marks showing where the rear wheels of the rear truck made any marks either?

A. No.

Q. So if the rear truck went entirely off you would expect, naturally, to find marks over the rail, wouldn't you?

A. Yes.

Q. And if the front trucks of the empty went off over the rail you would expect to find marks there, too, wouldn't you, naturally?

A. Well, not—no, in snow conditions you don't usually find the marks of a light car.

Q. How much did that car weigh?

A. That car weighs——

Q. Forty tons?

A. No, no. Twenty tons, one half of it.

Q. Twenty tons; forty thousand pounds?

A. Yes.

[fol. 441] Q. You don't think that would put a mark in the rail?

A. They don't usually in snow.

Q. All right. Now, then, to get back to your proposition, referring to these two marks nearest the crossing, you found one mark of a flange and within three inches of it the mark of another flange?

A. Now, you understand the three inches is the leaving mark of the rail there, in indicating them that way.

Q. Where they left the rail?

A. Yes.

Q. Yes?

A. The north end of those marks are three inches——

Q. That is what I mean?

A. Yes.

Q. You would say the one furthest from the crossing was the west wheel of the rear truck, would you?

A. The furthest one from the crossing would be——

Q. The west wheel of the rear truck?

A. The second one would be the south wheel of the south truck from the east side.

Q. Well, it would be the rear truck?

A. Yes, but this wheel would cross over the track there.

Q. I say the wheel which would cross first would be the one furthest or nearest to the ditch, that would be your opinion, of course?

[fol. 442] A. This truck you refer to?

Q. Yes, sir.

A. This indication of the situation is of the opposite wheel crossing that rail of the rear truck.

Q. The east wheel?

A. That would be the east wheel, yes.

Q. It would be the mark it would make as the east wheel crossed the west wheel?

A. The west wheel?

Q. That is what I say; this mark furthest from the crossing would be the west wheel?

A. Oh, no.

Q. That would be the east wheel?

A. That would be the east wheel, yes.

Q. Let's get it this way then: As the car would be running north the east wheel would be to the right?

A. That is right.

Q. And the west wheel to the left?

A. Yes.

Q. Now, taking this mark furthest from the crossing, would that be the right wheel that would make that mark or the left wheel?

A. That would be the right wheel.

Q. Then after the right wheel which was over on that side of the truck had gone over, the left wheel would make the mark in front of it?

A. No.

Q. Is that correct?

A. No, the left wheels have made their mark away back.

[fol. 443] Q. Well, both of these marks were made by the right wheels?

A. Yes—not both those marks. One mark is the flange mark of a wheel on the west side.

Q. Well, that is what I say.

A. Yes.

Q. Of what truck?

A. That would be the rear truck.

Q. That is what I thought.

A. Yes.

Q. Well, what wheels made these two marks (counsel indicating)?

A. One wheel mark was made by the west forward wheel of the rear truck.

Q. Forward wheel of the rear truck?

A. That is the last mark next to the crossing.

Q. I see.

A. Yes, sir.

Q. And which mark would that be nearest?

A. That is nearest the crossing.

Q. Nearest the crossing?

A. Yes.

Q. Then the one furthest away from the crossing?

A. Or the second. That would be the second mark.

Q. That is the one nearest the crossing?

A. Yes, of those two.

Q. We will call that the crossing?

A. Yes.

Q. That mark which was nearest the crossing would be made by the west wheel of the rear truck of the car of ties—

[fol. 444] the front truck?

A. The front truck, yes.

Q. You mean the first truck?

A. The first truck, yes.

Q. Oh, I didn't understand you, then. Then the mark nearest the crossing would be made by the forward truck of the car of ties?

A. No.

Q. I thought you said that just now?

A. We are talking about the second mark.

Q. I am speaking about the mark nearest the crossing.

A. Nearest the crossing.

Q. What wheel went over there?

A. As I have said before, that mark there is the forward west wheel of the rear truck.

Q. All right. Now, the one right back of it, what wheel made that?

A. That would be a right hand wheel from the east side.

Q. Then, they were both made from the right side?

A. Oh, no.

Q. I can't get it.

A. I have explained it several times.

Q. Yes. Perhaps if I get a piece of paper you can explain it a little clearer. Now, see if I can do it this way and maybe get it plainer.

A. All right.

Q. This exhibit represents, as I view it, the track as it runs on that plat?

A. Yes.

[fol. 445] Q. That is north?

A. North.

Q. South, west and east?

A. Yes.

Q. Now that would represent roughly the crossing?

A. Correct.

Q. The mark nearest the crossing was twelve feet, about, was it not?

A. Yes.

Q. And the next mark from the crossing would be about three inches?

A. Exactly, between the northerly points of the leaving end of the marks.

Q. Yes. Where I have got these cross marks the wheel went off making the first—well, I will put wheels on here.

A. If you would put these wheels back farther, put a pair of wheels in the center of the track.

Q. In the center of the track?

A. That would be one wheel in the center of the track here and one outside, owing to the initial derailment of the wheels on the right side.

Q. I see. All right. Now, as the car went along, which wheel of which truck made the mark farthest from the crossing of these two marks?

A. The wheel that is not shown now. If you would put two more wheels here of the wheels of the rear truck, the back wheel of the truck on the east side.

Q. All right. That is "A"?

A. Yes, sir.

[fol. 446] Q. That is the one that made this mark?

A. Yes.

Q. And which wheel made the mark just beyond it, three inches away?

A. That mark was made by the forward wheel of the south truck and the west wheel—no, the truck back here (indicating).

Q. Oh, away back here?

A. That is the forward truck.

Q. Is this the forward truck of the car of ties?

A. Yes.

Q. Then back here would be another set of trucks?

A. Yes. This wheel—this set of trucks is presumably on the track at this time.

Q. It is presumably on the track?

A. Yes.

The Court: Mr. Davis, the way the witness is being examined I do not see how that diagram you are using could be introduced in evidence nor understood by the jury. Could you not examine this witness according to this diagram?

Mr. Davis: Why, yes, I will, your Honor. I thank you for the suggestion.

The Court: I think the jury can see and understand it much better.

Mr. Davis: All right.

Q. Mr. Kelly, how far are the wheels of the trucks apart?

A. The trucks of the car?

Q. Yes.

A. Forward from the rear truck?

[fol. 447] Q. Yes.

A. They are about thirty feet.

Q. No, I mean across the rail?

A. The width of the truck beam?

Q. Well, how far?

A. The width of the truck is about eight feet.

Q. Are the wheels eight feet apart?

A. No.

Q. How far apart?

A. The wheels from the inside are 53¼ inches, from the inside of the flange.

Q. From flange to flange?

A. From flange to flange, yes.

Q. How far is the front set of wheels of the front truck from the second set of wheels of the front truck, from center to center?

A. From center to center? On those wheels I don't know exactly, but in the neighborhood of five feet.

Q. There is another truck, of course, to the rear of a car?

A. Yes.

Q. How far are the front wheels of that rear truck from the rear wheels of the front truck?

A. About twenty-five feet.

Q. And then the rear wheels of that rear truck are the same distance as in the front truck?

A. Approximately.

Q. The car is about a forty foot car, I believe?

A. Just about.

Q. Could it be possible that in an accident of that kind where cars are derailed suddenly some other wheel, other [fol. 448] than the ones you have picked out, could have hade those marks?

A. Those marks belong to this combination.

Q. I say could it have been possible that other wheels than the ones you have picked out could have made those marks?

A. I didn't take any certain wheels.

Q. Well, you have designated them?

A. Yes.

Q. Would it be possible that other wheels than those you have designated could have made those marks?

A. Yes.

Q. You were not there at the time, of course?

A. No.

Q. All you are giving is your guess or opinions as you see the marks now, isn't it?

A. I am giving my opinion on experience.

Q. Yes.

A. In investigating these accidents.

Q. Investigating cases for the company?

A. Yes, sir.

Q. Is it a part of your duty when there is a derailment to investigate?

A. Yes, we make investigations of this kind and then work out——

Q. For the purpose of ascertaining all the facts?

A. Yes.

Q. About what caused the derailment?

A. Exactly.

Q. I suppose you make those investigations as rapidly [fol. 449] and quickly as possible after the accident before any evidence may vanish?

A. No, I just make these investigations when there is a question, when there is any question as to the cause of the derailment that cannot be arrived at. I then make investigation from the circumstances.

Q. Do you make investigations for trials of cases?

A. I don't remember that I have made investigations for trials.

Q. You have testified before?

A. Yes.

Q. Numerous times?

A. Yes.

Q. Testify frequently in cases for the Soo Line, don't you?

A. Well, not so frequently; occasionally.

Q. And when a car goes off the track, if all four wheels of the truck of the forward car went off the track and went over into the ditch, you would expect to find the marks for all those wheels' flanges on the rails, wouldn't you?

A. Ordinarily, yes.

Q. But you would not expect to find them of the empty, as I understand you?

A. Under certain conditions we wouldn't.

Q. And isn't it quite a well-known fact in railroading that where there are derailments it is very difficult to tell, after the accident if you didn't see it, which the first car was, where there was a derailment and a lot of cars bunched up?

[fol. 450] A. Well, it is not so difficult. You usually match up the indications on the track with the equipment found in the wreckage.

Q. In other words, if a car derails a string of freight cars and twenty cars went off the track, you think a year and a

half afterwards, by going over to the track and looking at the marks on the rails, you could tell which car was first, which second and right on, don't you?

A. In some accidents.

Redirect examination.

By Mr. Boyle:

Q. You didn't find any marks on the ties down there?

A. No marks on the ties.

Q. How do you account for that?

A. That is accounted for in the traveling of the wheels on the snow. They don't usually make a mark on the ties when they are derailed in snow of that kind.

Recross-examination.

By Mr. Davis:

Q. I understand you, then, to tell this jury that if a car goes off the track that it will cut through the snow or the ice enough to make a mark on the rails, a flange mark, won't it, frequently?

A. No, if there is ice on the rail you will have no flange mark on the rail.

Q. Never could happen, could it?

A. Didn't happen.

Q. Never has happened on the Soo railroad where a car [fol. 451] cut through ice and made a flange mark?

A. You don't ordinarily have a flange mark if you are on ice.

Q. But you do sometimes, don't you, Mr. Kelly?

A. Oh, if they are loaded heavy enough.

Q. Well, this was a pretty heavy load, wasn't it, 400 ties weighing 200 pounds a piece? There is 80,000 pounds or forty tons, and the car was twenty tons, I think it was, or twenty-five, sixty-five tons; that is a fairly heavy car, isn't it, Mr. Kelly?

A. That isn't so heavy.

Q. You would call that a light load?

A. Compared to the traffic.

Q. If the car cut through the snow then you would expect to find the marks on the rails?

A. Well, sometimes. Usually do with a loaded car.

Q. Yes, all right. But if the snow was so soft that you could make snow balls out of it as it left the rails and cut into the rails and made a mark, you tell this jury it would not leave a mark on the ties?

A. Yes.

Q. That is your opinion?

A. That is my opinion.

Q. Don't you know it would cut through the snow just as easily that was over the tie as the rail?

A. I do not.

[fol. 452] Q. You think it would be harder for it to cut through that snow?

A. Absolutely.

Q. With snow up to the same amount exactly, the snow covering the rail and the tie, the same kind of snow, so soft and mushy that you could make a snowball out of it, it would cut through that snow and make a mark on the rail and in your opinion would not make a mark on the tie?

A. Different altogether.

Q. I say do you mean to tell this jury that the flange of a car as heavy as that would not cut through that soft snow?

A. Yes.

Q. Well, if it cut through that soft snow, would it not cut that tie?

A. Not ordinarily, no.

Q. Well, you were not there at that wreck at all?

A. There are no marks on the ties.

Q. Well, I know there aren't. That might indicate that there was ice on the ties and that is why they didn't mark them, might it not?

A. There would be more liability of ice being on the ties than on the rails, because you are continually flanging your track. The head of the rail is being flanged continually and there is more liability of ice on the tie than on the rail.

Q. Would you then say that, in your opinion, the reason you did not find any marks on the ties was because there was ice on the ties?

A. I don't know.

[fol. 453] Q. Well, what is your opinion on this question?

A. My opinion is and my experience is that snow on the ties of that depth will many times keep the flange up off the ties so there will be no mark.

Q. Your idea of it, then, that the snow on the ties kept the flange up off of the ties so there was no mark left?

A. Yes, sir.

Q. You don't know how much ice there was on those ties nor how high it was when this car was derailed, do you?

A. No.

Q. And if there was ice on those ties so the ice was over the top of the rail you certainly would not expect to have a mark on that tie, would you?

A. Nor on the rail.

Q. Nor on the rail, but you would not expect to find it on the tie, would you?

A. No.

Q. Now, you heard Mr. Moquin on the stand, did you?

A. I was here.

Q. You heard him testify that this car when it derailed cut through the ice to the rail, didn't you?

A. Well, I may have. I don't——

Q. Well, that is his testimony.

A. Yes.

Q. Now, as an expert, if you will assume this question, assume that that is true, that this loaded car cut through the ice that was over the top of the rail down to the rail, you would then expect a flange mark, wouldn't you?

[fol. 454] A. Yes.

Q. Yes. You don't know whether there was ice over that rail at the time of the accident or not?

A. Well, the only indication I have for it is the flange of these wheels marking the rail. It doesn't usually happen if the ice was over the rail at that time.

Q. But I say will you be willing to assume the basis of my question, assume that Mr. Moquin told the truth?

A. Yes.

Q. That there was ice over the top of the rail and that the flange of the wheel cut through that ice down to the rail; if that were true you would expect a mark on the rail, wouldn't you?

A. It might. Yes, you might have a slight mark there.

Q. Well, you know that, don't you?

A. There is a question about it lasting, about whether it would last this length of time or not.

Q. A flange mark that would mark the rail, would it last or not?

A. Oh, they last.

Q. Why, certainly it would. Why do you say that?

A. Well, if they get into the rail.

Q. Well, certainly; they wouldn't get into the rail unless they marked it, would they?

A. No.

Q. What did you mean by a question how long they would last? What did you have in mind?

A. I had your question in mind.

[fol. 455] Q. I asked the question if Mr. Moquin told the truth and this car cut through the ice down to the rail you would expect to find a flange mark and you said yes?

A. Yes, that is right.

Q. Then you volunteered the statement it would depend how long it would last; what did you have in mind when you suggested that to the jury?

A. Well, I just had in mind the improbability of the flange marking the rail in that case.

Q. Then, in that case there wouldn't be anything to last, would there?

A. No.

Q. Well, then, what did you mean when you said it would depend on how long that flange mark would last?

A. Well, if the flange mark is made, that is all.

Q. It lasts, doesn't it?

A. Yes.

Q. Stays there?

A. Yes.

James M. Gorham, called on behalf of the defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Where do you live?

A. I live here in Brainerd.

Q. How long have you lived in Brainerd?

A. About seven years.

Q. What is your business?

[fol. 456] A. I am a photographer.

Q. How long have you been engaged in that business?

A. Oh, twenty, twenty-two years, something like that.

Q. Did you go over to Cloverton with us and take some pictures of the scene which is shown on Defendant's Exhibit 12, the place of the Moquin accident?

A. Yes.

Q. You have those pictures with you?

A. I think so.

Q. In the first place, you noticed that stakes had been put up around?

A. Yes.

Q. What looked like a crossing there?

A. Yes, sir.

Q. And a marker in the middle of that place?

A. Yes.

Q. And then other stakes put up along the track?

A. Yes.

Q. It was right around that vicinity that your pictures were taken?

A. Yes, sir.

Q. Where was your camera placed when you took your first picture?

A. Well, the first picture was to make a general view. The camera was placed on the east side, shooting a little northwest.

Q. How far from the crossing was that?

A. About seventy-five feet.

[fol. 457] Q. That is the distance between——

A. Distance from the center to the camera, the farthest point.

Q. Distance from the center of the crossing to the camera in a southeasterly direction?

A. Southeasterly direction, yes.

Q. And how far from the house track straight east?

A. Sixty-seven feet.

Q. How high was your camera when that picture was taken?

A. The camera was five feet and one inch high.

Q. Will you give us that first picture you took that you refer to as a general view?

A. That is written on the back.

Q. You have your notes on the back?

A. I have notes on the back there that I took at the time.

Q. Have you a set without notes?

A. There is another set there, yes, sir.

Mr. Boyle: I kept a blank set so if there was any objection to his notes we would have them.

Mr. Davis: I have no objection to that notation at all.

Mr. Boyle: Very well. It may be more convenient.

Q. Is Defendant's Exhibit 13, picture referred to as No. 1, the one to which you have just referred?

A. That is No. 1.

Q. You took these pictures at Cloverton yesterday about what time?

[fol. 458] A. Oh, it was pretty close to six, between five and six o'clock, I guess.

Q. Then you developed them after you got back?

A. Developed them after I got back last night and got the prints off this morning.

Mr. Boyle: We offer in evidence Defendant's Exhibit 13.

Mr. Davis: If the defendant offers this for the purpose of illustration we have no objection, but it will be conceded, I presume, that it is not a photograph of the condition of the track at the time of the accident?

Mr. Boyle: Oh, absolutely. So far as snow and ice is concerned there isn't any——

Mr. Davis: Or so far as debris is concerned in or about the tracks. This is a year and three months later.

Mr. Boyle: It is understood that this was taken yesterday and that the purpose of taking it was to show in general the location of the crossing which is shown on Defendant's Exhibit 12 and the marks along the track.

Mr. Davis: With that in mind I have no objection.

The Court: Received for that purpose only.

Mr. Boyle:

Q. The stake that is shown on the picture in colors was the stake that was set in the middle of the crossing, was it?

A. Yes.

Q. The four stakes around that were on the corners of [fol. 459] that crossing?

A. Each side, yes, sir.

Q. The other stakes shown along the track are stakes that extended to the south from the crossing itself?

A. Yes.

Q. When this picture was taken there were some little white marks shown along near where the stakes were?

A. Yes.

Q. Was there some question then about whether or not you were going to have light enough or whether the stakes would show up?

A. Well, that was for the purpose of showing where those marks were to be able to focus the camera sharp so you would be able to see the detail.

Q. That is on account of the distance that you were away?

A. The distance I was away at that time, yes.

Q. Will you give us your second picture? Where was your camera set when you took this second picture?

A. A little closer; almost the same view, but a little closer up, showing more in detail.

Q. Have you got the figures showing the distance from the center of the crossing?

A. Thirty-five feet and eight inches from the center for the longest distance.

Q. And directly east of the track?

A. About fifteen feet.

Q. Fifteen feet?

[fol. 460] A. Right angle.

Q. How high was your camera when that picture was taken?

A. Four feet and a half high.

Q. And you have the same kind of notations on the back of this one?

A. Same notation.

Mr. Davis: With the same understanding, that they do not pretend to show the condition of the tracks at the time of the accident, we have no objection.

The Court: Received with that understanding.

Mr. Boyle: Your picture No. 2, then, Mr. Gorham, has now been marked as Defendant's Exhibit 14?

A. Yes.

Mr. Boyle: I understand Defendant's Exhibit 14 has been received in evidence?

Mr. Davis: There is no objection with that understanding.

Mr. Boyle: Let us see your picture No. 3, please?

The Court: No. 2 shows the house track alone?

Mr. Boyle:

Q. No. 2 shows the house track only, does it, Mr. Gorham?

A. Yes.

Q. And No. 1 or Defendant's Exhibit 13, shows the passing track and also part of the main track?

A. Yes.

Mr. Boyle: You are right, your Honor. No. 2 shows the house track only.

[fol. 461] Q. What view does No. 3 show, Mr. Gorman?

A. You call this the house track?

Q. Yes, the house track where the stakes were put up.

A. It shows the house track and the side—the west side of the track and the ditch or a supposed ditch on this side.

Q. On the west side of the track?

A. On the west side.

Q. Where was your camera setting when picture No. 3 was taken?

A. Well, it was looking north, north on the track.

Q. Give us the distance from the center?

A. The distance was 52 feet from the camera to the center of the house track, from the camera to the center of the house track and the center line of the crossing.

Q. How far from the track itself directly west?

A. Seven feet from the camera to the center of the house track.

Q. At right angles?

A. At right angles, yes.

Q. How high was the camera?

A. Four feet and a half high.

Q. And the view is looking north?

A. Looking north.

Q. Is your picture No. 3 now marked as Defendant's Exhibit 15?

A. "15."

Mr. Boyle: Offer Defendant's Exhibit 15.

Mr. Davis: With the same statement, that it does not in [fol. 462] any way pretend to show the condition at the time of the accident and was taken yesterday and may be used for the purpose of illustration, we have no objection.

The Court: Received with that understanding.

Mr. Boyle:

Q. Is your picture No. 4 marked Defendant's Exhibit 16?

A. Yes.

Q. What view is shown in your picture No. 4 or Defendant's Exhibit 16?

A. Well, it is a close-up view looking southwest, showing the track, the condition of the track where the stakes are set.

Q. And what particular part of the track did you attempt to get into this picture?

A. I attempted to show the markings of the track.

Q. In this picture you attempted to show the marks that were on the track?

Mr. Fryberger: On the rails?

A. On the rails.

Q. And your camera was set for this picture at what point?

A. Twenty-three feet from the camera to the south stake.

Q. And what other——

A. Three foot and about ten inches high from the ground to the camera.

The Court: Shows the west rail of the house track?

[fol. 463] A. Yes, sir.

Mr. Boyle: Shows the west rail of the house track and is a close-up view of the marks on the track?

A. Yes, sir.

Mr. Boyle: Offer Defendant's Exhibit 16.

Mr. Davis: Just one or two questions.

Q. This photograph did not show and does not show all the marks on the track, does it?

A. Well, I——

Q. There were seven marks pointed out to you?

A. Well, that just showed part of them.

Q. Outside of two it is rather difficult to see any mark on the track; those were the two long marks?

A. Well, there are three long marks there. The first one begins——

Q. This one?

A. This side here, begins here, ends here. The other one come up here (indicating).

Q. Isn't this all one continuous mark here?

A. No, I don't think so.

Q. Do you remember whether this mark here was closest to the crossing or farthest away?

A. Well, I don't—from that picture it doesn't show. I might have cut the first mark off on that picture.

Mr. Davis: Then all it shows is that there is one long mark from the third post or stake nearest my right hand and nearest the right-hand corner of the picture, that runs [fol. 464] towards the right-hand side of the picture for about an inch on the photograph?

A. No, there are three marks.

Q. I am taking this one first. There is one there?

A. Yes.

Q. Then there is one starting at about the second or third post—the second post from the right-hand side of the picture and doesn't that extend about half an inch toward the side of the picture?

A. Yes.

Q. And then where is the third mark?

A. Where it begins here. The third one begins here and runs right past the post.

Q. Past this post?

A. Yes.

Q. Where is the mark where it runs past this post in this picture?

A. Well, you can see it.

Q. I would like to have you point it out to me.

A. Begins up here, this mark here that runs along here.

Q. On the top of the ball of the rail?

A. Right on the side of the rail.

Q. That little bit of a mark?

A. Yes, that is part of it.

Q. That little mark next to the post to the right of the picture is what you say——

A. Well, that is part of it.

Q. —is a photograph of a mark on the rail?

A. That is part of it, yes.

Mr. Davis: We have no objection, with the understand-
[fol. 465] ing that it shall not be taken to show the condition at the time of the accident and is merely for illustration.

The Court: It may be received with that understanding.

(Defendant's Exhibit 16 received.)

Mr. Boyle:

Q. Will you get your next picture? What view is shown in your picture No. 5 which is now marked Defendant's Exhibit 17?

A. That is just a close-up picture similar to the one that I made showing the marks on the rail. This is just a little closer up.

Q. Where was the camera when that picture was taken?

A. Directly in front, shooting west.

Q. In the same position?

A. In the same position.

Q. That is, on your fifth set-up you really took two pictures?

A. Yes, I took two pictures.

Q. And this is another close-up view of some of the marks?

A. Some of the marks.

Mr. Boyle: Offer Defendant's Exhibit 17.

Mr. Davis: With the understanding as before we have no objection.

The Court: Received with that understanding.

Mr. Boyle:

Q. And your sixth set-up is marked as Defendant's Exhibit 18?

A. Yes, sir.

[fol. 466] Q. And what view is shown there?

A. That is a view looking south.

Q. Showing the west side of the track, showing the condition of the track and the siding and the condition of the ground along the west side?

A. Yes, the west side.

Q. There is also in the distance a loading jammer down there, isn't there?

A. Yes.

Q. Where was your camera at the time the picture was taken?

A. It was about nine steps from the camera to the south stake which was defining the south edge of the crossing over the ditch.

Q. Have you any other distance?

A. From the camera to the center of the track was two and a half steps or paces.

Q. That would be straight west of the track?

A. Straight west of the track.

Q. And the view was looking south?

A. Looking south.

Mr. Boyle: Offer Defendant's Exhibit 18.

Mr. Davis: With the understanding that this is not for the purpose of claiming that it shows the condition of the ditch at the time of the accident or of the track at the time of the accident, but for the purpose of illustration, we have no objection.

The Court: Received with that understanding.

Mr. Boyle:

Q. Picture marked Defendant's Exhibit 19, that was your seventh set-up?

A. Yes, sir.

[fol. 467] Q. Your eighth picture?

A. Yes.

Q. What view do you show in this picture?

A. Well, the camera was setting on the west side, shooting east or a little to the southeast, showing the center, showing the road crossing, the general condition of the track in looking across it from the west side.

Q. Where was your camera placed for this picture?

A. On the west side about twelve paces from the center of the track—twelve paces from camera to the center of the track, to the farthest stake. From the camera to the

center of the track it was about nine paces from the camera to the center of the nearest point.

Q. And how high was the camera from the ground?

A. About sixty inches high.

Q. And the view is looking southeast?

A. Southeast.

Mr. Boyle: Offer Defendant's Exihibit 19.

Mr. Davis: With the same understanding, we have no objection.

The Court: Received with that understanding.

Mr. Boyle: That is all the pictures that you took?

A. That is all I have.

Cross-examination.

By Mr. Davis:

Q. Did you say that was all the pictures you took?

[fol. 468] A. Yes, sir.

Q. Did you not take a picture there yesterday showing the white marks on the rail?

A. There is one of those pictures shows that.

Q. Which one is that?

A. The first picture, No. 1.

Q. Is this the only picture you took yesterday showing the white marks on the rail, the only exposure you made?

A. Well, the same condition possibly showed on the second picture.

Q. It doesn't show on the second, does it?

A. No, this is the only one.

Q. And that was taken quite a distance back from the west rail, was it not?

A. Yes, sir.

Q. If it had been taken up closer it would show the west rail much better?

A. Yes.

Q. Yesterday was the first time that you ever were at Cloverton, I assume?

A. Yes, sir.

Q. You know nothing about the condition of the tracks a year and three months ago when the accident occurred?

A. No.

Q. And do not pretend to state that these photographs show the condition of the tracks or the ditch or the roadway or anything as it existed when the accident occurred?

A. No, sir.

Q. You have learned that this accident happened in the [fol. 469] winter with snow?

A. Yes.

Q. Your photograph shows no snow, does it?

A. No, sir.

RUDOLPH RAASCH, re-called on behalf of defendant, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Mr. Raasch, at the time of the Moquin accident were there any planks laid at the crossing shown on the plat, Defendant's Exhibit 12?

A. Yes, sir.

Q. How were those planks laid?

A. There was a plank on each side of the rail inside and one plank outside.

Q. How long had those planks been there so far as you know?

A. Well, they were there when I came there.

Q. And had they been there all of the time while you were there?

A. Yes, sir.

Q. They were there at the time the accident occurred, were they?

A. Yes, sir.

Cross-examination.

By Mr. Davis:

Q. Did you testify this morning that there was part of that building up there?

A. Which building?

Q. That building where the old warehouse was?

[fol. 470] A. Well, there was rubbish and part of what was left of it away in the back.

Q. The side of the building wasn't standing up there?
A. No, there was no building.
Q. Didn't stand up there eight or ten feet?
A. No.
Q. You are sure of that, aren't you?
A. Yes.
Q. The entire building had been torn down and just rubbish piled up?
A. Part of the building back there on the piers in the back, the west—well, it would be the west side.
Q. But the part of the building didn't extend up eight or ten feet in the air?
A. No.
Q. Isn't it a fact that that building was torn down in the spring of 1927, and that the lumber was all taken away in October of 1927, and that the only thing that remained were the cement posts and one beam of about eight inches that lay on the ground, wasn't that all that was there?
A. No, there was stuff laying there, accumulation.
Q. There was no lumber there?
A. I wouldn't say whether that was lumber there or what it was. I didn't examine that closely, but I knew it was rubbish and part building what was left there.
Q. Well, the only part of the building that you saw was that beam, wasn't it?
[fol. 471] A. What I have answered as the part of the building meant some lumber, boards and stuff what was left there because we used some of that lumber. We dug out some of it to try to fill in when we rerailed that car.
Q. Will you now state that all of the lumber outside of the beam had not been removed from that place in October, 1927, by Mr. Halsted who owned the building?
A. Hadn't been all removed?
Q. It had all been removed; will you state it had not?
A. Not that it had not been removed unless somebody else put it there.
Q. About how high up would you say that extended?
A. Oh, I don't know. I didn't measure it.
Q. Ten inches or a foot?
A. I couldn't say for sure how high it was, but it was——
Q. The rear end of the building wasn't standing there?
A. It wasn't standing up in the air, no.
Q. Where was it—laying down on the ground, was the rear end of the building laying down on the ground?

A. There is a floor in it.

Q. I say was that standing there?

A. Not the building, no.

Q. The rear end of the building?

A. It wasn't standing.

[fol. 472] Q. By the rear end of the building what do you mean?

A. Well, the west side, I think, as I remember it, the west. I don't know which is the rear end of it.

Q. The west side of the building would be the side of the building farthest away from the track?

A. Yes.

Q. In your testimony this morning you said that the rear end of the building was there; now, do you mean by the rear end of the building that the whole thing was together and was either standing up or laying flat on the ground?

A. Well, the rear end of the building, what I meant was where the foundation was in the back end, in the west end.

Q. Yes.

A. Across in there. I didn't dig down to see how far, but across there is what I mean, what I call the west end.

Q. What you really meant to say was at the rear end of the building was where that was?

A. Well, it is the rear end.

Q. Were these boards which you now claim to have gotten out of there covered with snow?

A. Yes.

A. Well, there wasn't very much snow over there.

Q. Wasn't very much there?

A. Not very much.

Q. Hadn't drifted there?

[fol. 473] A. No, just drifted over; that is, drifted away.

Q. Drifted away?

A. Just a little there.

Q. What kind of boards were those?

A. Well, I don't know what. I didn't pay no attention to what kind they were. They was only boards.

Q. Did it look like the siding of a house?

A. No.

Q. Or like a two by four?

A. No, it was no two by four. Just boards.

Q. How thick was that board, how thick would you say the board was?

A. Seven-eighths of an inch or an inch. Common board.

Q. Would you say it was flooring?

A. I wouldn't say because I don't know whether it was flooring or not. It was a common board, anyway.

Q. The day after the accident were you there when Gust Johnson who was on the stand came there?

A. We were up the track just that moment when he come off the train.

Q. Did you come down there where he was?

A. I came down, yes.

Q. When Gust Johnson was there, when he came the day after the accident, was the rear end of the building standing up eight or ten feet in the air?

A. No.

[fol. 474] Redirect examination.

By Mr. Boyle:

Q. In answer to one of Mr. Davis' questions, you made some reference to the floor that was back there; will you tell us just what you had reference to, describe the condition with reference to a floor which you had in mind.

A. Well, what I had in mind, I don't know if it came from all over the floor or not, but it is what laid there, just throwed on a pile there and left. I don't know for sure, but that is what it looked like.

Recross-examination.

By Mr. Davis:

Q. You haven't a very good recollection of it now?

A. Well, I wasn't there when they tore the building down.

Q. That is why you don't remember?

A. Don't remember if it was tore down either, only it was piled there.

Floyd Maurer, re-called on behalf of defendant, testified as follows:

Direct examination.

By Mr. Boyle:

Q. When you were on the witness stand you were not asked about the crossing over the house track. I would

like now to ask whether there was a crossing over the house track being used to haul pulpwood at the time of the Moquin accident?

[fol. 475] A. Yes, sir.

Q. And where was that crossing?

A. Well, that crossing was between that warehouse and those cement blocks.

Q. And were there planks on the track at that point?

A. Yes, sir.

Q. To cross over the track?

A. Yes, sir.

Q. How were those planks there, how were they placed there?

A. There were two planks on each rail on the outside and there were two on the inside. Four planks altogether.

Q. Were those planks fastened down there?

A. I wouldn't say to that. I don't remember about that.

Q. How long had those planks been there so far as you know?

A. As far as I know those planks had been there about five years, as far as I know. It was five years since I have been in that country and they were there when I come, so I really don't know how long they have been there.

Q. Had that crossing been used during the entire five years that you were at Cloverton?

A. Yes, sir.

Q. And was any other crossing along the house track used?

A. No, sir.

Q. Any place along that house track was there any other crossing used? I am not now talking about the main street.

[fol. 476] A. No, there wasn't.

Q. What, during the time of this accident, was in the yard south of the cement blocks? You understand that there were some cement blocks there shown on this plat, Defendant's Exhibit 12, at the point marked "cement blocks" where I am pointing my pencil?

A. Yes, sir.

Q. And over here the Golmo warehouse, you know where that is?

A. Yes, sir.

Q. And when you said between the warehouse and the cement blocks you meant in here (indicating on plat)?

A. Yes, sir.

Q. So that those things would show the crossing that you have described?

A. Yes, sir.

Q. I am talking about this part south, understand, this southerly portion?

A. Yes, sir.

Q. What was in this yard south of the cement blocks?

A. There was pulpwood.

Q. How was that pulpwood piled along there?

A. It was piled the length between the jammer and the cement blocks.

Q. Was that entire yard piled with pulpwood at that time?

A. Yes, sir.

Q. At the time of the accident?

[fol. 477] A. Yes, sir.

Q. You have heard the testimony regarding the marks on the west rail of the house track here this afternoon and this morning, have you?

A. Yes, sir.

Q. And you remember seeing those marks down there at Cloverton?

A. I don't remember noticing the marks myself.

Q. You didn't go down there yesterday?

A. No, sir.

Q. Do you remember at the time of the accident whether or not there was any part of the building or debris from the building around those cement blocks?

A. Yes, there was rubbish piled there.

Q. With reference to the location of the cement blocks, was that at the rear or away from the track or closer to the track?

A. It wasn't so close to the track.

Cross-examination.

By Mr. Davis:

Q. Did the back end of the building stand up there at the time of the accident eight or ten feet, up here, over here (counsel indicating on plat)?

A. No.

Q. You heard Mr. Johnson this morning testify that the day after the accident when he came down there the back

of the building was standing up there and extended eight or ten feet straight up in the air?

A. I didn't notice.

[fol. 478] Q. Well, do you know whether it was or not?

A. No, I don't think it was.

Q. You say you don't know whether it was or not?

A. No, I don't think it was.

Q. Who put those planks down there, do you know?

A. No, I don't.

Q. Who took them up?

A. The section crew took them up.

Q. When?

A. It was—I think it was in—the next June after the accident we took them up.

Q. Yes, the accident happened and they were taken up the next June?

A. The next June.

Q. Was anybody else there when they were taken up taking pictures?

A. No, sir.

Q. Were you ever there when any pictures were taken?

A. No, sir.

C. M. Monson, re-called on behalf of defendant, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Mr. Monson, when you were on the witness stand before we didn't ask you about a crossing over the house track?

A. No, sir.

[fol. 479] Q. You remember that there was a crossing used over the house track at the time Mr. Moquin was injured?

A. Yes, sir.

Q. Where was that crossing?

A. It was between what is known as the Golmo warehouse and where these cement blocks were.

Q. Were you there when there was a little building on those cement blocks?

A. No, sir.

Q. I have forgotten, how long did you live in Cloverton?

A. Well, I was familiar with the town for about three years. I lived south of Cloverton ten years.

Q. Was the building that was on the cement blocks torn out of there before you went to Cloverton?

A. Yes, sir.

Q. So you never saw that building?

A. No, sir.

Q. Was there any part of that building left there at the time of the accident? What is your recollection on that?

A. There was what you might call a pile of rubbish there, but I don't know whether it was part of the building or not.

Q. Was this crossing between the Golmo warehouse and the cement blocks in use at the time of the Moquin accident?

A. Yes, sir.

Q. Was there any other crossing along the house track used at that time? I am not talking about the main village [fol. 480] street crossing.

A. No, there was no other crossing used.

Q. While you were in Cloverton had any other crossing ever been used over that house track?

A. No, sir.

Q. Excepting this crossing between the Golmo warehouse and the cement blocks?

A. No, sir.

Q. What is your recollection about the yard south of the cement blocks? You know where I mean?

A. Yes, sir.

Q. What was in that yard at the time of this accident?

A. As far as I can recollect, it was pulpwood piled along there on the west side of the track.

Cross-examination.

By Mr. Davis:

Q. The snow had drifted over the track to the south of the crossing, hadn't it?

A. Yes, sir.

Q. That is where the biggest drifts were and the most snow?

A. Yes, sir.

Q. The least snow was towards the north?

A. Yes, sir.

Q. I don't suppose you watched every time teams drove to see whether they drove on one side of this crossing or to the south or north of it, you wouldn't know that, would you?

A. No, sir, I wouldn't.

[fol. 481] Q. You didn't pay any particular attention that winter to see, did you?

A. No, sir.

Q. You didn't have anything to call it to your attention particularly that winter?

A. No, sir.

Q. Since that winter, up to the present time, say today or yesterday, you didn't have occasion to recall your recollection of that matter, did you?

A. No, sir.

Q. Who called that to your attention yesterday or today? About the crossing.

A. Well, I knew that crossing was there.

Q. Who called it to your attention?

A. Called what to my attention?

Q. About what you knew about it?

A. Nobody, as far as I know.

Q. Nobody ever mentioned it to you?

A. No, sir.

Redirect examination.

By Mr. Boyle:

Q. Did I ask you about the planks on the crossing at that time, Mr. Monson?

A. I don't believe you did.

Q. What is your recollection about whether or not there were planks there at that time?

A. There was four planks altogether, two on the inside of the rails and two on the outside.

Q. Had those planks always been there up until the time of the accident?

A. As far as I know, yes, sir.

[fol. 482] Recross examination.

By Mr. Davis:

Q. How long were those planks?

A. I don't know.

Q. How wide were those planks?
A. I don't know that either.
Q. How thick were those planks?
A. Well, I think they were average crossing planks.
Q. You think, but you don't know?
A. Well, I am not certain. I think thickness was what you were asking me about, wasn't it?
Q. Is there anything more you want to add to your answer, Mr. Monson?
A. No, sir.
Q. Do you recollect that winter that there was a pile of wood to the south of the Golmo warehouse, along the right-of-way, piled up there, lots of wood that winter?
A. There was wood, yes, sir.
Q. And about how much of it?
A. I don't know.
Q. There was a considerable pile, quite a high pile of wood, that these men had piled up there, wasn't there?
A. Well, there always was more or less wood.

Redirect examination.

By Mr. Boyle:

Q. The question counsel just asked you would bring the wood immediately south of the Golmo warehouse, between the warehouse and the cement blocks, did you mean to say—
[fol. 483] A. No, sir.
Q. —that there was wood piled up in there?
A. No, sir, there was no wood there.
Q. Where was the wood that you had in mind?
A. South of where this other old building had been.
Q. South of the cement blocks, you mean?
A. Yes, sir.

Recross examination.

By Mr. Davis:

Q. Would you say there was no wood south of the Golmo warehouse or that you don't know?
A. South of this other building, yes.
Q. No, I mean just south of the Golmo warehouse?
A. No, sir, there was no wood there.

Q. You are sure of that now?

A. Yes, sir.

Q. And you recollect that distinctly?

A. Yes, sir.

Q. And you paid particular atention so that you know there was no wood there?

A. I know there was no wood there.

Q. Was there a car standing there for several weeks, extending across the northerly end of that crossing between the Golmo warehouse and the cement blocks, a boxcar?

A. Not that I remember.

LOUIS KNUTSON, re-called on behalf of defendant, testified as follows:

[fol. 484] Direct examination.

By Mr. Boyle:

Q. Mr. Knutson, when you were at Cloverton yesterday, did you measure the height of the cement blocks that are shown on the plat, Defendant's Exhibit "12"?

A. No, I didn't measure them. They were various heights.

Q. You can not give us, then, the exact measurement of each one of those blocks or the distance from the ground to the top of the block?

A. No, I couldn't do that.

Q. In a general way, tell us what your recollection is about those blocks. What I particularly am inquiring about is your recollection of the distance between the ground and the top of the blocks.

A. Well, the foundation blocks nearest the tracks were the most exposed, that is, the little pillars there that were closer to the track on the inner side of the ditch there, more of them exposed, possibly a foot or more exposed to view, and those further away from the track were more covered up. That is, the ground seemed to rise as it left the track or left the ditch.

Q. Those in the first row nearest the track, parallel with the track, were in the ditch that you show on your plat?

A. Yes, they were on the top edge of the ditch. There were only two of those in place and one of them was tipped over and another one gone.

Q. This block that I am pointing to is the one that ap-
[fol. 485] parently was tipped over?

A. Yes, that is turned over. The one that should have been in there, that had been taken away from there and that is entirely gone.

Q. That is, you found no block?

A. No.

Q. At what would have been the northeast corner of that building?

A. No, sir.

Q. What is your recollection of the distance between the ground and the top of the blocks in the second and third and fourth rows of blocks?

A. Oh, they varied from four or five inches up to eight or ten, possibly, is my recollection of it. I took no measurements of any of them.

Cross examination.

By Mr. Davis:

Q. You just observed them the same as Mr. Campbell?

A. Yes, I was at each one of those and naturally would.

Q. You heard him testify today?

A. I did not.

Q. He testified in his opinion they were about two inches above the ground, you do not agree with him on that?

A. Well, no, I would not agree with Mr. Campbell on that, if that is his testimony.

Q. Were these two cement blocks, the first ones west of the house track, in the ditch or up on the ground?

[fol. 486] A. They were up pretty well on the bank of the ditch.

Q. Yes. They were not in the ditch a foot?

A. No.

George A. Kline, called on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Where do you live, Mr. Kline?

A. Duluth, Minnesota.

Q. What is your business or occupation?

A. Conductor on the Soo Line.

Q. How long have you worked as a conductor on the Soo Line?

A. Thirty years.

Q. What run do you have at the present time?

A. I have train No. 60 and 61 between Duluth and Dresser Junction.

Q. Is that a passenger train?

A. That is a passenger train, yes, sir.

Q. How long have you been on that run?

A. Four years.

Q. You were on that run at the time Mr. Moquin was injured?

A. Yes, sir.

Q. Did you go through Cloverton on the day following the injury?

A. Yes, sir.

Q. You went through Cloverton on the day of the injury, too, did you?

[fol. 487] A. Yes, sir.

Q. Did Mr. Moquin go on your train from Markville into Superior?

A. I was thinking it was Cloverton, but I believe it was Markville. We picked him up, I remember, and took him to Superior.

Q. The evidence here shows that Mr. Moquin was taken——

A. I believe it was Markville.

Q. —to a doctor at Markville?

A. Yes, sir.

Q. Anyway, Mr. Moquin went in on your train?

A. Yes, sir.

Q. On the day of the accident your run took you into Superior?

A. Yes, sir.

Q. The following day did you leave Superior to go to the other end of the run?

A. Yes, sir.

Q. On that trip you went through Cloverton again?

A. I went through Cloverton twice, going down in the morning from Duluth and going back in the afternoon. Each day.

Q. Did you stop at Cloverton and go over to the scene of the Moquin accident?

A. On train 60, going from Dresser Junction to Duluth, I did.

Q. And was anybody else on that train who had gone over to the scene of the accident?

A. Yes, sir, the roadmaster, G. A. Johnson.

[fol. 488] Q. Did you go over there at the time Mr. Johnson did?

A. Yes, sir, I followed him over there.

Q. Was the car still off the track or had it been re-railed at the time you got there?

A. It was off the track.

Q. Will you tell us just what the conditions were, what did you see when you got over to the place of the derailment?

A. I walked over to a crossing, there seemed to be a little trail across there, walked over to this old crossing that went up by an old building that stood here—well, we call it east and west. That would be on the left-hand side of the track. There is an old building standing there. This crossing went over the track, over to that old building or right by it. I walked to this crossing and sized up the condition of the car.

Q. Now, what did you see there with respect to ice or snow, Mr. Kline?

A. I see snow, but I didn't see any ice.

Q. Had there been some shoveling?

A. Yes, sir, there had.

Q. Were there any signs of ice having been picked out at all?

A. No, sir, I didn't see any ice picked out at all.

Cross-examination.

By Mr. Davis:

Q. When did you first know you were to be a witness in this case, Mr. Kline?

A. Nine-thirty-five yesterday—night before last.

[fol. 489] Q. Had anybody spoken to you from the time you were at Cloverton until night before last about this matter?

A. I had talked with the roadmaster about it. I asked him questions about it and such matters as that.

Q. When was that?

A. Oh, at different times I asked him how the case was coming on, if he heard anything more about it, if they had settled or something like that.

Q. When was the last time you talked to him before you were called as a witness?

A. I think the last time I spoke to him about it was when he was coming up here from Superior, I asked him where he was going or something to that effect and he said he was going to Brainerd, on this Moquin case.

Q. He didn't say anything to you about coming up at all?

A. No, sir.

Q. Who called you up?

A. Mr. Simpson, the superintendent of the Superior division of the Soo Line.

Q. When you got there how many trucks were off the track?

A. There was the front pair of trucks off from the leading car, which I call the leading car, that went off the track first and went away from the rail, the front pair of trucks was all off and away from the rail, I would judge, about a forty-five degree, and the head pair of wheels of the rear [fol. 490] truck of that same car was off the track, one wheel off on the outside track and one on the inside and the two rear wheels were standing on the rail.

Q. About how far to the west did the front end of the car, the north end of the car, extend away from the track?

A. You mean the end of the car that was clear off?

Q. Yes.

A. And away from the track.

Q. That went about how many feet?

A. Well, I didn't take any observation as to the length of the car or I probably could give you a little better idea, but——

Q. Well, they have stated it was a forty foot car.

A. Well, then, probably thirty feet, maybe, from the track. Somewhere around that, as I can remember.

Q. In other words, the car headed to the west and extended about thirty feet in an angling direction of forty-five degrees away from the track?

A. I would judge about that. I wouldn't say positively.

Q. When you were there, did you notice that the car had knocked over one of the cement blocks?

A. I did not.

Q. Did you notice any cement blocks there?

A. I did not. I didn't go across the track.

Q. Did you notice whether there were any drifts there?

[fol. 491] A. I noticed some snow along the track. I couldn't say it was a real drift. There was snow in varied, different depths along between the tracks there.

Q. You didn't notice any drift there where this derailment took place?

A. Well, I can't say it was a regular drift. There was snow there that varied in distance. I suppose some of it was drift.

Q. What do you mean by a drift?

A. Why, a pile of snow that had been drifted up by the wind.

Q. About how high would you call a drift?

A. Well, higher than the level.

Q. Was there a drift of snow there where this accident took place? A considerable drift?

A. Well, there was some. I couldn't say the depth because I didn't take any observations to that.

Q. You didn't notice that?

A. I didn't notice the depth of it, no. I didn't think of that at all.

Q. Did you notice any men picking out ice between the track?

A. No, sir.

Q. Between the rail?

A. No, sir.

Q. Did you notice any of the section men using a pick?

A. No, sir, there were no section men there at the time.

Q. Did they later come there?

[fol. 492] A. I don't know.

Q. Didn't the section crew and the foreman come down there when Mr. Johnson was there?

A. Not while I was there at that time.

Q. Did you notice the end of the building standing up there eight or ten feet in the air?

A. No, sir, I couldn't see across from the car I was standing by. I didn't go to the other side of the car.

Q. You were there with Mr. Johnson?

A. I was there with Mr. Johnson.

Q. Did he go back to the train with you?

A. He went back to the train with me, yes, sir.

Q. He went right with you?

A. Yes, sir.

Q. Well, he could see the same as you could?

A. He walked on further over around there.

Q. Was the front truck of the empty car off the track when you got there?

A. That would be the leading truck that was further away from the track?

Q. Yes, the empty car is what I have reference to.

A. I suppose it was. Now, I didn't look under the car.

Q. Well, were there two cars or three or what?

A. Two cars.

Q. Were the front trucks of the car furtherest north off the track?

A. I saw some wheels on the ground, but I didn't pay any attention to whether it was all off or partly off.

[fol. 493] Q. That is which car? The second car?

A. I think I saw some wheels on the——

Mr. Boyle: Mr. Davis, you said further north. That is where the derailed car would be.

Mr. Davis: Well, I am speaking of that.

Q. The derailed car was the one furtherest north?

A. Yes, sir.

Q. And you say the car next to it, you saw some of the trucks on the ground, but you don't know how far off they were?

A. It looked that way the way I stood, but I didn't go over to it.

Q. So that not only was the car of ties off the rail, but as you saw it the next day, part of the front trucks of the next car back of the car of ties was also on the ground?

A. Well, I think it was, just from what I glanced.

Q. And you just looked through curiosity?

A. Yes, sir.

Q. You didn't make any close observations, of course?

A. No, sir.

Q. And with no thought of testifying or anything like that?

A. No, sir, I wasn't thinking of that.

Q. You didn't have any particular reason to charge your mind with that?

A. Nothing any more than to see how the accident occurred for my own special——

[fol. 494] C. E. URBAHNS, called on behalf of defendant, duly sworn, testified as follows:

Direct examination.

By Mr. Boyle:

Q. Mr. Urbahns where do you live?

A. Marquette, Michigan.

Q. How long have you lived in Marquette?

A. Since the 1st of April, this year.

Q. Before you went to Marquette, Michigan, where did you live?

A. Minneapolis.

Q. How long in Minneapolis?

A. Nine years and a half.

Q. What is your present position?

A. General manager of the South Shore Railroad.

Q. How long have you held that position?

A. Since the 1st of April, this year.

Q. Before you became general manager of the South Shore, what position did you have?

A. General superintendent of the Soo Line Railway.

Q. Were your headquarters at Minneapolis?

A. Yes, sir.

Q. How long did you have that position of general superintendent of the Soo Line?

A. Since the 1st of May, 1920.

Q. Then, you were general superintendent of the Soo Line at the time Mr. Moquin was injured?

A. Yes, sir.

[fol. 495] Q. What position did you have before you became general superintendent of the Soo Line?

A. I was superintendent at Stevens Point, prior to that at Fond du Lac, prior to that assistant superintendent, Chicago, chief train dispatcher at Fond du Lac, and prior to that I was with the Nickle Plate Railroad for twenty years.

Q. In connection with your railroad experience, have you had something to do with snow and ice and flanging out movements and that sort of thing?

A. Yes, sir, considerable.

Q. What has been your experience along that line, just in a general way?

A. I have been directing that sort of movement for twenty-five years as chief dispatcher and trainmaster, superintendent and so forth.

Q. Have you been out on the job taking part in flanging out movements?

A. Yes, sir, many times.

Q. Have you done some of that work yourself?

A. Been with the train crews, yes, sir.

Q. I call your attention to a message which was received in evidence here and which is marked for identification as Defendant's Exhibit "3." I think you are familiar with that telegram, or if you are not just read it.

A. Yes, sir.

Q. That telegram says to do a good job of flanging today and advise what tracks you flange out. Tell us, Mr. Urbahns, what is meant by flanging?

A. A flanger is what you would term a minature snow [fol. 496] plow. It is attached to the forward part of the engine, on the pilot, raised and lowered by air, operated by the engineer.

Q. I call your attention to Defendant's Exhibit "4," that is one of the engines of the Soo Line?

A. Yes, sir.

Q. That is a particular type of which the Soo Line has a certain number, I take it?

A. Yes, sir.

Q. It is in the testimony here that the engine that was on this train that Mr. Moquin was working on when he was injured was an engine of that type and that it was equipped with flanges in good order, you understand that, do you?

A. Yes, sir.

Q. You have been in the court room throughout the trial of this case, have you?

A. Yes, sir.

Q. Have you heard all of the testimony that has been introduced here?

A. Yes, sir.

Q. You understand what the situation was and what the conditions were at Cloverton at the time of the derailment when Mr. Moquin was injured?

A. Yes, sir.

Q. I wish you would tell us what was the proper way to flange out at Cloverton to carry out the order that has been received in evidence and which is marked Defendant's Exhibit "3."

Mr. Davis: I object to that as calling for a conclusion of the witness, no foundation laid.

The Court: Objection overruled.

[fol. 497] (Exception by plaintiff.)

A. The proper method to flange at Cloverton, under the conditions that existed there, with the cars on the track, was to stop at the east switch or the north switch, termed in both directions—that is, east and north—cut off the engine and go down the main line. That is, I am assuming that they did not know what the snow condition was when they got there. Go down the main line with the engine to the passing track switch, open the passing track switch at the west end, go back up the main line and come down through the passing track head-on, go out on the main line—that is, when they get clear through the passing track and then back up, or in that case there were two cars on the house track; take the two cars off the house track and set them over there on their train where they should have been. They were going with them, one of them was. And then back through the passing track, open up the west house track switch and go clear through the house track, always in a forward movement when flanging.

Q. Why is that?

A. Because the machinery is on the head end of the engine and they are not backing through snow.

Q. Can a flanging order be carried out by backing through snow drifts or can it be done in a proper way?

A. Absolutely not.

Q. Now, you have heard the testimony here that the cars were backed on to the house track and into snow that was [fol. 498] on the tracks, have you?

A. Yes, sir.

Q. Was that the proper method of carrying out an order for flanging as set forth in this telegram, Defendant's Exhibit "3"?

A. No, sir.

Q. Would you say that that was a direct violation of that order?

A. Yes, sir.

Q. I call your attention to Defendant's Exhibit "2," you know what that is?

A. Yes, sir, it is a time table in effect on that division at the time of the accident.

Q. Was that made either by you or under your direction?

A. It was made under my direction.

Q. I call your particular attention to rule No. 102, which is set forth in that exhibit.

A. Yes, sir.

Q. Are you familiar with that rule, Mr. Urbahns?

A. Yes, sir.

Q. Did you make the rule yourself?

A. Yes, sir, I helped compile it.

Q. And that rule was put into force by you as general superintendent of the Soo Line?

A. Yes, sir. That is, through my direction, the superintendent put it in force.

Q. Under the conditions existing at Cloverton at the time of the accident in which Mr. Moquin was injured, whose duty was it to carry out that order? The order re-
[fol. 499] fers to the flagging of the crossing, doesn't it?

A. Yes, sir. The rear brakeman.

Q. And you understand that Mr. Moquin was the rear brakeman on that train?

A. I do, yes, sir.

Q. Then, do you say that it was the duty of Mr. Moquin to carry out that order 102 at that time?

A. Yes, sir.

Q. Tell us, please, the manner in which that order should have been carried out by Mr. Moquin.

Mr. Davis: That is objected to as calling for a conclusion of the witness and purely speculative.

The Court: Objection overruled.

(Exception by plaintiff.)

A. This order should have been carried out by a member of the train crew standing on the highway crossing to protect both the train and the highway travel, preceding the movement across the highway.

Q. Is that when the engine and cars were backing over the crossing?

A. Yes, sir.

Q. When you say a member of the train crew?

A. Yes, sir.

Q. In this particular case, under the conditions existing, you say that is the rear brakeman's place to be?

A. Yes, sir.

Q. When that engine and those cars backed over that [fol. 500] crossing, where then should the rear brakeman have been?

A. He should have been on the highway crossing until the cars had passed over the highway crossing and the highway crossing was obstructed by cars.

Q. On the ground?

A. On the ground.

Q. At that crossing?

A. Absolutely.

Q. And after the engine and those cars had backed over that crossing, what was Mr. Moquin's duty then, under the conditions existing at that time?

A. Under the conditions that existed at that time and the way the train crew was going to make that movement as I find by testimony they proposed to back through to the far end of track and then flange back, he should have stayed on the crossing and protected the movement both ways.

Q. And was there any reason or any necessity under those conditions for Mr. Moquin to get on the boxcar from which he afterwards fell?

Mr. Davis: That is objected to as calling for the conclusion of the witness. The testimony here is that the conductor ordered him to do this.

The Court: Objection sustained.

(Exception by defendant.)

Mr. Davis: Leading and suggestive.

Mr. Fryberger: I want to take an exception to the remark that there is testimony that the conductor ordered

[fol. 501] him to do that. There is no such testimony as that in this case.

Mr. Davis: I think there is.

The Court: Very well. You may have an exception.

Mr. Davis: He told him what to do.

Mr. Boyle: I ask you, as the general superintendent in charge at that time, and in view of the experience that you have had in the railroad business, whether or not it was a direct violation of rule 102 in force at that time for Mr. Moquin to ride that boxcar back through that snow drift in the manner as shown in the testimony?

Mr. Davis: That is objected to as calling for a conclusion of the witness.

Mr. Boyle: Well, experts can be called upon for conclusions. This man, if your Honor please, was in absolute charge of——

Mr. Davis: Well, granted.

Mr. Boyle: —of the Soo Line at that time and this is calling for his expert opinion on it.

Mr. Davis: No, it isn't. That is just the point. The rule may be introduced and he can state what the duty is, but now he is asking this witness to state a pure conclusion as to whether the rule is violated or not by all the evidence in the case.

Mr. Boyle: You may add this to it, that what I am asking for is your opinion with respect to that, Mr. Urbahns.

Mr. Davis: Well, the same objection.

The Court: Objection sustained.

(Exception by defendant.)

[fol. 502] Mr. Boyle: I had offered rule 102 in evidence before and at that time I asked your Honor to reserve ruling on it until we laid further foundation. At this time I wish to offer in evidence rule 102, referred to in the testimony of Mr. Urbahns, contained in Exhibit "2."

Mr. Davis:

Q. Mr. Urbahns, this is the entire rule, is it not, just as it reads there?

A. Yes, sir, it is in the card there.

Q. You were asked by Mr. Boyle to state what this rule meant and I thought you said it meant to protect the cross-

ing and the property of the company; will you find anything there except to protect the crossing, in that rule, and if so point it out in that rule?

A. Protect the crossing.

Q. And the property of the company?

Mr. Boyle: That is objected to as not proper cross examination at this time.

Mr. Davis: Oh, yes, he said that is what this rule meant and before it is admitted I want to know where that is in the rule.

The Court: The witness may answer the question.

(Exception by defendant.)

Mr. Davis:

Q. Find it in the rule.

A. Protecting the crossing also protects the train. It may not be worded just that way.

Q. Is there a word about protecting the train in that rule—one word? If there is, point it out.

[fol. 503] A. It may not be worded just that way.

Q. Answer my question: Is there a word about protecting the train in that rule? Look at the rule again.

A. I have read the rule. I know it by heart.

Q. And you know that there isn't a word there about protecting the train? Yes or no, please.

A. I can't answer it yes or no.

Q. You can't answer that yes or no?

A. Not yes or no, no, sir.

Q. Very well. Now, Mr. Urbahns, the crossing to be protected is a highway crossing?

A. That is where the man is supposed to be stationed.

Mr. Davis: Yes: I think that is all. No objection.

Mr. Boyle: This rule may be received, then, I understand, your Honor?

Mr. Davis: Yes.

The Court: Yes.

Mr. Boyle: At this time I would like to ask the opportunity of reading the rule to the jury?

The Court: You may have that opportunity.

Mr. Boyle: "Rule No. 102. Movement over highway crossings. In the movement of engines with or without

cars switching over highway grade crossings within yard limits, commercial and station sidings, mine, industrial or passing sidings; unless there is a crossing watchman at his post, or the gates are down, a member of the train or engine crew will protect highway traffic at crossings by preceding each movement over the crossings and see that all [fol. 504] highway traffic has been stopped before signaling the engineman to proceed.

"The same protection will be given whenever a light engine is making a movement, either forward or backward, over highway crossings at grade except when running from one station to another as a straight-away movement. Also whenever a train or engine takes a siding and obscures the view from the highway of an approaching train. When necessary to cut a train at a highway-grade crossing the ends of the cut, where practical, shall be not less than fifty feet from the center——"

Mr. Davis: Well, Mr. Boyle, you do not claim that is material in this case?

Mr. Boyle: Well, no, but it is in the rule.

Mr. Davis: I don't know why you should read an immaterial part.

Mr. Boyle: I was reading the entire rule. I think perhaps, if your Honor please, that the paragraph that I was reading should have been omitted from the offer.

The Court: Very well. That portion may be omitted.

Mr. Boyle: I thought that that was another rule until I got up to it.

Q. Mr. Urbahns, apparently rule 102 has three or four paragraphs. Will you read the first paragraph and let us know just what part of that rule covers the situation here so that we will just confine our offer to that?

A. You mean to read it aloud?

[fol. 505] Q. No, no, just to yourself. Just give us the paragraphs then.

The Court: He might mark it on the margin with a pencil.

Mr. Boyle:

Q. Yes. What I want to get at, if there is some portion of it that is not material in the case there is no use putting it in the record, that is all.

A. Well, the first paragraph would be enough for this condition.

Q. The first paragraph?

A. Yes.

Mr. Boyle: All right, then, if your Honor please, our offer of No. 102 will be confined to the first paragraph, unless counsel wants to introduce some other part of rule 102.

Mr. Davis: I haven't read it all. I would like to object as incompetent, irrelevant and immaterial and no foundation laid.

The Court: I understood it had been offered in evidence, that there was no objection and that it was received.

Mr. Davis: Well, I will withdraw my objection.

Mr. Boyle:

Q. In making switching movements, Mr. Urbahns, does one of the brakemen always travel with the engine?

A. Always.

Q. Under the conditions existing at Cloverton at the time of Mr. Moquin's injury, whose duty was it to travel with the engine?

A. The head brakeman.

[fol. 506] Q. That would be Mr. Carr in this case?

A. Mr. Carr in this case, yes, sir. In railroad terms they put it that the head brakeman always follows the engine.

Q. And was there any other member of the train crew, then, whose duty it would be to carry out this rule 102, excepting Mr. Moquin, under those conditions?

Mr. Davis: That is objected to as not the best evidence, calling for a conclusion of the witness.

The Court: The witness may answer.

(Exception by plaintiff.)

A. There would be no other member of the crew to do that work.

Q. Did you hear the testimony that was given by Mr. Rennie that after he had received this order to flange out, Defendant's Exhibit "3," he gave a general order to the two brakemen to put the flanging order into effect?

A. Yes, sir.

Q. I would like to ask you whether or not it was proper for the conductor, Mr. Rennie, under the circumstances existing, to leave that work to the brakemen without further supervision?

Mr. Davis: Well, that is objected to as calling for a conclusion of the witness.

The Court: Mr. Reporter, will you read me the question?

(Last question read.)

The Court: And the objection is what?

Mr. Davis: Incompetent, irrelevant and immaterial, calling for a conclusion of the witness and not the best evi- [fol. 507] dence.

The Court: The witness may answer.

(Exception by plaintiff.)

A. It was perfectly proper.

The Court: The question was for him to leave it to them or to instruct them?

A. Well, I would say the same thing either way; that is, he could leave the work in their charge after he told them what to do without any further instructions. That is what I mean.

The Court: After he told them what to do?

A. Yes.

Mr. Boyle:

Q. Just what do you mean, after he told them what to do?

A. I mean that after Mr. Rennie either showed them this message or told them that he had instructions to do a good job of flanging, that was as much supervision as he need to give them, that they were competent to do the work.

Q. Merely tell them to carry out those instructions?

A. Yes, sir.

Q. Or carry out that flanging order?

A. Yes, sir.

Q. I ask you whether under the conditions existing there at Cloverton, the car that was derailed, from which Mr.

Moquin fell might have been derailed with the snow in the condition in which it was at that time, without any condition of ice?

A. Yes, it could have been.

Q. And just why is that, explain how that derailment [fol. 508] would happen, what would cause it?

A. Well, as the wheels revolve there is more or less snow cast on the flange—or on the tread of the wheel—the tread is the part that rides on the rail—and it keeps gathering underneath and packs until it raises it up until the flange goes over the rail. Snow will do that.

Q. And is that particularly true about snow during thawing weather, that it packs easily?

A. It packs more easily than dry snow.

Q. And is that the reason why, in a proper flanging movement, the proper way to carry it out is to go in head-on instead of backing in?

Mr. Davis: That is objected to as leading and suggestive and calling for the conclusion of the witness and argumentative.

The Court: Sustained.

(Exception by defendant.)

Mr. Boyle:

Q. Mr. Urbahns, it appears in the testimony in this case that on one side or along one rail, and as I now remember the testimony, along the west rail, the snow at the place of the derailment was piled higher than the snow along the right rail, would that have anything to do with a derailment? If so, explain.

A. In that case it would derail easier than it would if the snow was level across.

Q. And why is that?

A. Because it has a tendency to slew the trucks to the direction where the most resistance is. That is, when it is going into the bank on one side it rather slews the trucks [fol. 509] and raises them to the side where the obstruction is and derails that much quicker.

Q. How are the trucks fastened to the car?

A. Just by one center pin. That is, there is a pin that goes down through the center of the bolster and they ride in what they call a male and female casting. The trucks would revolve all around, in other words, if they were suspended.

Q. That is, if the car was suspended up in the air?

A. The trucks would revolve.

Q. The trucks would revolve?

A. If the pin didn't drop out, yes, sir.

Q. So that if there is more resistance on one truck than there would be on the other truck that would tend to put the wheels out of line, would it?

A. Yes, that is true.

Q. My recollection was that there was some reference made in one of the rules to a train, Mr. Urbahns, what is a train, so far as railroad rules are concerned, what is referred to when you refer to a train?

A. Well, it is an engine, with or without cars, carrying markers. That means that a train is not complete until it has what we term markers on the rear end and the Soo Line used lamps, classification signals, that is what they are called, for the rear end, and if there are no markers on a train it is not complete. It is not a train.

Q. When the engine and two cars were backing on the house track at Cloverton at the time of this accident, would [fol. 510] that be a train?

A. No, sir.

Q. My recollection is that when Mr. Moquin was on the witness stand he testified that he was on that car as it backed over the crossing and was watching the crossing from the car and that that was a part of his duty, what is the fact as to whether or not that is true or is not true?

Mr. Davis: That is objected to as an improper question, as to whether it is true or untrue.

Mr. Boyle:

Q. Well, what is the fact, was that in the line of Mr. Moquin's duty?

A. No, it wasn't in the line of his duty. He should not have been on top of the car. The head brakeman was following the engine. He was doing the moving of those

cars and coupling up. The brake should not have been let off of that car until the head brakeman let it off because he didn't know—that is, the man who let the brake off would not know, under ordinary circumstances, whether that car may move, and might cause some accident.

Q. So that the brake should not have been loosened until the engine had coupled on?

A. And the head brakeman should do that himself.

Q. At the time of this accident was it proper under any circumstances, to merely watch the crossing from the car instead of flagging the crossing from the ground?

A. It was not proper.

[fol. 511] Cross-examination.

By Mr. Davis:

Q. Mr. Urbahns, handing you rule 923 of the book of rules of May 1, 1912, was that rule in full force and effect at the time of this accident?

A. Yes, sir.

Mr. Davis: We offer in evidence rule 923.

Mr. Boyle: That is objected to as incompetent, irrelevant and immaterial. It has absolutely no application here.

The Court: It refers only to train movements. Objection sustained.

(Exception by plaintiff.)

Mr. Davis:

Q. Let me ask you, do you mean to say the switching movements are not train movements?

A. No, sir.

Q. Switching any part of a train is not a train movement?

A. No, sir.

Q. You will so state, will you?

A. No, sir, not in railroad terms.

Q. No switching movement is considered a train movement?

A. No, sir.

Q. At any time?

A. No, sir.

Q. When a brakeman is on a train, would you state that if he is on cars with an engine attached that he is not on a train?

A. No, sir, he is not.

Q. Not on a train?

[fol. 512] A. No, sir.

Q. What did you say the definition of a train was?

A. A train is an engine with or without cars, carrying markers.

Q. You heard Mr. Kelly on the stand, did you?

A. I think so, yes, sir.

Q. You heard him testify, did you not, that he had in repeated instances seen train crews, brakemen and conductors and engineers back cars through snow and then come forward and flange?

A. I don't think he mentioned flange. I think he said he had backed them through snow and came forward?

Q. Came forward and flanged?

A. No, he was talking about derailing cars.

Q. No, did I not ask him this question, if repeatedly he had not seen men in doing flanging, back in through the track and then come forward and flange the track?

A. No.

Q. And that they were never disciplined?

A. I don't agree with you.

Q. You don't recollect that testimony?

A. I don't recollect it, no, sir.

Q. Now, did you hear him testify that in repeated instances he had seen the men do that and did not discipline them?

A. Mr. Kelly has nothing to do——

Q. Will you just answer my question? I am not asking you to argue the matter.

A. Well, but I think it calls for an argument.

[fol. 513] The Court: Just a moment. One at a time. Mr. Reporter, will you read the question and please answer the question as directly as you can.

Mr. Boyle: But if the question calls for an explanation, your Honor, I submit that the witness ought to be permitted to make it.

Mr. Davis: Certainly. You may ask him that later.

Q. I will ask the question again. I think you can answer it by yes or no. I would like to have you. I will try and make it so it can be answered that way. Did you hear Mr. Kelly testify that he had seen your train crews back in on trains with cars where there was snow and that they were not disciplined for that? You can answer that yes or no.

A. Yes.

Q. I presume, Mr. Urbahns, that the rules and all the rules of the company are to be read together looking to the proper carrying out of the work of the company, that would be true, would it not?

A. Well, yes. They don't all go together, but that is the general intention.

Q. Sometimes there may be an apparent or a frivial inconsistency between rules—you try to avoid that, of course?

A. Yes.

Q. But the purpose of the rules is to facilitate the movement of the trains and carrying on the company business?

A. Yes.

Q. That requires speed and dispatch?

[fol. 514] A. Yes, sir.

Q. And a man working the train is under the charge of whom, a conductor?

A. Conductor, yes, sir.

Q. He is in charge of the train?

A. Yes, sir.

Q. I presume the brakemen are under his control and direction, the same as the engineer or fireman?

A. Yes, sir.

Q. At all times. That is true, isn't it?

A. Yes.

Q. Where an engineer should get an order from the conductor to do a certain thing it would be his duty to reasonably follow the instruction, wouldn't it?

A. Yes, sir.

Q. That would be true of any other employe, he is under the control of the conductor?

A. Yes, sir.

Q. The purpose of Rule 102 so far as it reads is for the purpose of protecting the crossing where travel goes across it, that is all you find in the rule, isn't it, in the reading of the rule?

A. Well, literally, you might construe it that way.

Q. Yes, anything else you have put in there you do not find in the written word, do you? Just answer that, if you can, by yes or no.

A. Yes, sir.

Q. And if Mr. Moquin had been near that crossing as he went to get on the car and came across it and got on the [fol. 515] car, would you tell this jury he did not precede the movement of the car over the crossing?

A. I would say that he had not carried out the instructions.

Q. You answer my question without——

A. I am.

Q. Will you answer it by yes or no? Would you say if Mr. Moquin had walked from the depot down over the crossing and got on the car that he had not preceded the movement of the car over the crossing? Yes or no.

A. He had preceded the car, yes, he had preceded the movement.

Q. Yes.

A. But not in the direction it was going.

Q. Well, I didn't ask you that. He preceded the movement of the car?

A. I have got to qualify that. I cannot answer those questions that way because it leaves the wrong inference.

Q. Well, I am just asking these questions. He had preceded the car over the crossing hadn't he?

A. Yes, he did, but he may have ten or twelve or fifteen minutes before.

Q. If he did it immediately, if he preceded it immediately before the car went over the crossing?

A. No, because he went the wrong way.

Q. He went toward the car?

A. Yes, but he isn't preceding the car over the crossing if he is going the other way.

Q. But the purpose would be to protect the crossing for [fol. 516] traffic, wouldn't it? That is the purpose of the rule, to protect the crossing for traffic?

A. Yes, sir.

Q. And if in walking towards the car he saw there was nobody coming and then went on the car, so far as protect-

ing traffic there would be a compliance with that rule, wouldn't there?

A. No, sir.

Q. Well, the crossing would be protected so far as travel would be concerned, wouldn't it?

A. No, sir.

Q. And when there wasn't anybody in sight say for a mile either side and he walked over the crossing, and stood on the crossing, saw that no one was in sight, walked a few feet ahead and got on the car, you would say he violated that rule?

A. No, autos do get on the crossing inside of a second.

Q. I didn't ask you that.

A. Well, I am answering it.

Mr. Davis: I move it be striken out as not responsive.

Mr. Boyle: I submit it is a proper explanation, something the witness should be permitted to explain.

The Court: Well, the answer may stand.

(Exception by plaintiff.)

Mr. Davis:

Q. Mr. Urbahns, if he had crossed the crossing, walked right over here and the car was within ten feet of the crossing and if he had hung onto the side of the ladder and [fol. 517] walked with the car, would he have complied with the rule?

A. No, sir.

Q. Walked right with the car across the crossing, he would not have complied with the rule?

A. No, sir.

Q. Ice is one of the frequent causes of derailments, isn't it?

A. Well, it isn't a frequent cause. It will do it.

Q. Yes, and ice over the top of the rails will derail a train?

A. Yes, sir.

Q. Very easily?

A. Yes, sir.

Q. It is the duty of the section men to keep ice from over the top of the rails?

A. Yes, sir.

Q. And whether they are backing in or going in with the engine if they strike an inch and a half or two inches of ice there would be likely to be a derailment?

A. Yes, sir.

Q. It is very dangerous to have ice over the rails?

A. Yes, sir.

Q. And the consequence would be very likely to be a derailment?

A. Yes, sir.

Redirect examination.

By Mr. Boyle:

Q. Mr. Davis asked you to explain the purpose of Rule 102 and you said that it was for the purpose of protecting [fol. 518] the crossing and you had started to explain some other purpose in your earlier testimony; just what other purpose did you have in mind?

A. Well, we have had so many accidents due to—

Mr. Davis: Now, just a moment. I don't think that is a proper answer.

The Witness: I can't explain those things unless you let me say something.

Mr. Davis: And self-serving.

The Court: Just a moment. The question is what other purpose than the protection of the crossing? Protection of what?

A. Of the trains and the employes. Now, I could explain that, but if I darsen't—I could tell you why.

Mr. Davis: Just a moment.

Mr. Boyle: All right, go ahead, Mr. Urbahns, and explain it for us, if you will, please.

Mr. Davis: That is objected to as incompetent, irrelevant and immaterial, self-serving and not calling for any matter of evidence in the case.

The Court: The witness may explain what he means by protecting the property of the railroad company and the employes.

(Exception by plaintiff.)

A. By protecting the highway crossing at the present day you are protecting most automobile travel. If you strike an automobile it is very apt to go underneath or derail the cars or some such thing is bound to happen. I [fol. 519] can tell you of some very serious accidents due to that very cause.

Mr. Davis: I ask that that be stricken out as not responsive.

The Court: That may be stricken.

(Exception by the defendant.)

The Witness: All right, but that is the reason for it.

Mr. Boyle: And when you designed this Rule 102 you intended it as a protection not only for the public, but also for the employes and the property of the company, did you, Mr. Urbahns?

Mr. Davis: That is objected to as to what the intention was. The rule is there itself. It is calling for the conclusion of the witness and self-serving.

The Court: Sustained. He has explained the rule.

(Exception by the defendant.)

Recross-examination.

By Mr. Davis:

Q. You heard the testimony that at the other stations where this flanging movement was made that the engine backed in and then headed out, did you not, every other place?

A. I think all but at one place and that was Patzau where they picked up the car and set it over and then went over the track.

Q. All the other places you heard the testimony that they took the engine in through the snow and then came through and flanged?

A. Yes, I heard it.

[fol. 520] Q. And in each and every one of those cases the engineer, the fireman and whoever was on that engine, head brakeman, were guilty of a violation of the rules, weren't they?

A. Yes, sir.

Q. And they have never been disciplined for it, have they?

A. Well, didn't know it until it came out in court probably.

Q. Hadn't you ever heard of it before now?

A. Never heard of it.

Q. Did you investigate this case?

A. I did not, no, sir.

Q. You didn't know a thing about it?

A. No, sir.

Redirect examination.

By Mr. Boyle:

Q. If there was flanging out movements carried on by backing in the snow at other places outside of Cloverton, was that a violation of their duty, as well as at Cloverton?

A. Yes, sir.

J. B. KELLY, re-called on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Boyle:

Q. I think there may be some confusion in the minds of some of us regarding your testimony about backing cars into snow; at least, when Mr. Davis was cross examining [fol. 521] Mr. Urbahns I did not have the same understanding of the matter as he apparently had and I would like to clear that up. When you were talking about backing cars into snow, were you talking about flanging out movements?

A. No.

Q. Just what did you have in mind? What were the situations under which you were talking about backing cars into snow?

A. The circumstances there were different, although I did not qualify. These cases I meant is in clearing up snow-bound trains, for instance, freight trains stuck in the snow on the main line. In that case we come up there and the engine is not capable of moving more than four or five

cars. We cut the train to that extent and pull out with these four or five cars to loosen them up in the snow and then back in, seeing, of course, that there are no men on the cars and we find that that is a much easier way to open up that track and get the train going. The same applies on sidings. It is necessary to move all cars out of sidings entirely before you can put through a flanging operation and many times we take the cars out in that way and work them back and forth and do get cars off the track.

Cross-examination.

By Mr. Davis:

Q. Mr. Kelly, when I asked you that question yesterday did I not ask you this question: Have you not repeatedly seen men back cars in on the track and then come forward [fol. 522] and flange the track out? Do you remember my asking you that question?

A. Yes.

Q. And you answered yes?

A. Yes.

Q. You understood that question?

A. I did not attempt to qualify it.

Q. Well, you understood the question?

A. Yes.

Q. It was a simple question?

A. Yes.

Q. And then I asked you if you had not seen that done repeatedly, backing cars in, coming forward and dropping the flanger and flanging the track and you said yes and they had never been disciplined for it?

A. That is right.

Q. And when I asked you if they had been disciplined you said they had not been disciplined?

A. There was no occasion because——

Q. Well, you didn't offer that to the jury yesterday, did you?

A. I said they had not been disciplined.

Q. Well, you didn't offer any explanation when I asked you that question if they had been disciplined?

A. I didn't think I would be permitted.

Q. Why, Mr. Kelly, I asked you if you had not repeatedly seen men take a car through the snow and then come for-

ward and flange out the track just as this operation was done; you understood that question, didn't you?

[fol. 523] A. Well, not as this operation was done, no.

Q. You didn't understand it that way?

A. No.

Q. Why, Mr. Kelly, what did you understand when I asked you if you had seen the men back a car attached to the engine back into the snow and then come forward and flange, if you didn't understand it that way?

A. Well, I believe I said there that you could take a chance. You could take a chance and do that.

Q. Yes, and I asked you if you had not repeatedly seen the men doing that and didn't you answer that yes?

A. Yes, that is right, too.

Q. And then didn't I ask you if you had ever disciplined them?

A. No necessity for discipline. No necessity and no discipline. I said I recommended, I would recommend, if necessary.

Q. Recommend what?

A. Recommend discipline, if necessary.

Q. Well, now, you said they could take a chance; by that you meant that they were violating the rules?

A. I said they would take a chance. I would like to explain——

Q. Answer my question, please.

Mr. Boyle: Well, now——

The Court: Answer the question as directly as you can. If counsel for the defendant wishes to further examine you [fol. 524] he will have an opportunity to do so.

Mr. Davis:

Q. Now, Mr. Kelly, when you stated to the jury that they took a chance you meant by that they were violating the rules, didn't you?

A. Yes.

Q. And when you stated that you had seen them do this and they had not been disciplined, you knew that my question referred to a violation of the rules when I asked you the question yesterday, didn't you?

A. Well, the circumstances would be different.

Q. Well, I say you knew my question had reference to a violation of the rules when I asked you if they had been disciplined?

A. Well, not exactly.

Mr. Boyle: The defendant rests, your Honor—oh, no, just a minute. Before we rest I think we have not offered in evidence Defendant's Exhibit 12. We will offer this exhibit in evidence now.

Mr. Davis: No objection.

Defendant rests.

(Recess.)

For the Plaintiff in Rebuttal

Noah Moquin, plaintiff, re-called in his own behalf in rebuttal, testified as follows:

Direct examination.

By Mr. Davis:

[fol. 525] Q. Mr. Moquin, you heard the testimony of Conductor Rennie on the stand, did you?

A. Yes, sir.

Q. You heard him testify that you said to him that when you were going back there you were afraid something would happen as they backed in; did you ever make any such statement to him at any time?

A. No, sir.

Q. Or ever discuss that in any way with him?

A. No, sir, never did.

Q. And you heard Brakeman Carr testify that you——

A. Yes, sir.

Q. —that you said, "We will have to take it easy through here"; did you ever make any such statement?

A. No, sir.

Q. Did you have any reason to think you would have to take it easy through there?

A. No, sir.

Q. Did you know there was any ice on that track until after the derailment?

A. No, sir.

Q. I will ask you if you had a talk with Mr. Rennie in the hospital?

A. Yes, sir.

Q. And you may state to the jury whether Mr. Rennie told you in the hospital that ice derailed this car?

A. Yes, sir.

Mr. Boyle: Just a minute. That is objected to as hearsay [fol. 526] and not proper rebuttal, incompetent, irrelevant and immaterial.

The Court: The foundation was laid for it, as I remember. Mr. Rennie was asked that question and he stated either that he didn't or that he couldn't remember.

Mr. Boyle: I submit that being the case, if your Honor please, that my objection is good.

Mr. Davis: Well, we withdraw it, then.

Mr. Boyle: I move that the answer be stricken. The answer may be stricken?

The Court: The answer may be stricken.

Mr. Boyle: And I would like to have the witness wait until we have an opportunity to object.

Mr. Davis: Yes, if you will kindly wait.

Q. Did you hear Mr. Carr on the stand?

A. Yes, sir.

Q. Did you hear me ask him this question, if he had not stated to you in the hospital that ice derailed that car?

A. Yes, sir.

Q. Did he state that to you in the hospital?

Mr. Boyle: Just a moment.

A. Yes, sir.

Mr. Davis: Just a moment, Mr. Moquin. Please don't answer so rapidly.

Mr. Boyle: I move that the answer be stricken.

The Court: The answer may be stricken.

Mr. Boyle: That is objected to as incompetent, irrelevant and immaterial and not rebuttal.

The Court: Objection overruled.

(Exception by defendant.)

[fol. 527] Mr. Davis:

Q. Did Mr. Carr make that statement to you in the hospital, that ice derailed the car?

A. Yes, sir.

Q. Mr. Urbahns, the general superintendent or manager of the railroad has been on the stand with reference to Rule 102; you have seen that rule, I believe?

A. Yes, sir.

Q. Now, do you know for several years before this accident what the practice and custom was in brakemen going over crossings in small towns like Cloverton as to riding cars over the crossing?

Mr. Boyle: Wait a moment.

A. Yes, sir.

Mr. Davis: Just a moment, if you will please wait, Mr. Moquin.

Mr. Boyle: This is obpected to as incompetent, irrelevant and immaterial and not proper rebuttal.

The Court: You mean since the rule was adopted?

Mr. Davis: Yes.

The Court: Sustained.

Mr. Davis: Exception. We offer to show by this witness that it has been the practice and custom, in spite of the rule, for brakemen, not only this plaintiff, but other brakemen, in the presence of conductors, to ride cars over the crossings in towns like Cloverton, and it has been repeatedly done and the rule has not been observed and it has been the practice and custom not to observe it.

Mr. Boyle: Objected to as incompetent, irrelevant and [fol. 528] immaterial and not proper rebuttal.

The Court: The same ruling.

Mr. Davis: I think, your Honor, that we have some decisions in Minnesota which sustain our position there.

(Counsel for plaintiff and defendant confer with the court.)

The Court: You may renew your question.

Mr. Davis: Very well, you- Honor.

Q. I will ask you if you know what the practice and custom was with reference to Rule 102 as to whether or not men rode the tops of cars in going over crossings?

Mr. Boyle: Now, wait a minute. This is objected to——

The Court: Just a moment. That wasn't your original question. Your original question included in places of the size——

Mr. Davis:

Q. Well, yes, in places of the size of Cloverton, small places?

Mr. Boyle: That wasn't the original question either, if your Honor please.

The Court: In substance.

Mr. Boyle: Riding on top of cars wasn't involved in the other question.

The Court: Mr. Reporter, will you read the question?

Mr. Davis: I thought it was.

The Court: The question to which objection was made. (Question read as follows: "Q. Now, do you know for sev-[fol. 529] eral years before this accident what the practice and custom was in brakemen going over crossings in small towns like Cloverton as to riding cars over the crossing?")

Mr. Davis:

Q. Do you know what that practice and custom was?

A. Yes, sir, just the way I did it.

Q. The way you did it that day?

A. Yes, sir.

Mr. Boyle: Just a moment.

Mr. Davis:

Q. Had you done it repeatedly?

A. Yes, sir.

Mr. Boyle: Just a minute. I wonder if our objection was preserved and a ruling on it?

The Court: You may have an objection to that question, the same objection you made before, and the answer of the witness as now given may stand.

Mr. Davis:

Q. Had you done that repeatedly?

A. Yes, sir.

Q. In the presence of conductors?

A. Yes, sir.

Mr. Boyle: This is taken subject to the objection.

The Court: This is subject to the objection.

Mr. Davis:

Q. Had you seen other brakemen do the same thing?

A. Yes, sir, many times.

Q. Now, then, when you were on top of this car no ac-
[fol. 530] cident happened at the main street crossing, did there?

A. No, sir.

Mr. Boyle: Just a moment. This is objected to as incompetent, irrelevant and immaterial.

The Court: This accident didn't happen at the crossing.

Mr. Davis: Well, this accident or any accident, so he wouldn't be charged with a violation of the rule.

Q. Well, this accident didn't happen as you went over the main street crossing?

A. No, sir.

Q. And Mr. Moquin, as you went over that crossing could you see on both sides and far away?

Mr. Boyle: Wait a moment.

Q. Well, what view did you have as you stood on that car coming towards that crossing?

Mr. Boyle: This is objected to as incompetent, irrelevant and immaterial and not proper rebuttal.

Mr. Fryberger: There is no question being tried here over that.

The Court: The witness may answer the question.

(Exception by defendant.)

Mr. Davis:

Q. Just tell the jury what view you had going over the crossing.

A. I could see for five or six blocks each way.

Q. And did you look before you got on the car?

Mr. Boyle: The same objection.

[fol. 531] A. Yes, sir, I walked the full length of the crossing.

The Court: The same ruling.

(Exception by defendant.)

A. Yes, sir, I walked the full length of the crossing up to the car.

Q. Then do I understand you walked over the crossing before you got to the car?

A. Yes, sir.

Q. And then got up on the car?

A. Yes, sir.

Q. And when you walked over the crossing you were to what you would call the east of the car?

A. Yes, sir.

Q. And then you got up on the car?

A. Yes, sir.

Q. And when you walked over the crossing you may tell the jury whether or not there was anybody coming towards the crossing from either side?

Mr. Boyle: This is objected to as incompetent, irrelevant and immaterial and not proper rebuttal.

The Court: The same ruling.

(Exception by defendant.)

Q. Was anybody coming?

A. No, sir.

Q. And when you saw nobody coming after walking over the crossing you got up on top of the car?

A. Yes, sir.

Mr. Boyle: The same objection.

The Court: You may have the same objection to all this line of evidence.

[fol. 532] Mr. Boyle: All right, your Honor.

Mr. Davis:

Q. And did any vehicles or pedestrians or anybody come across that crossing as you were backing up?

A. No, sir.

Q. When you were thrown from the car how far had you gone east of the crossing, about how far?

A. I said about 150 feet.

Cross-examination.

By Mr. Boyle:

Q. Mr. Moquin, when you saw the condition of the house track did you come to the conclusion that it needed to be flanged out?

A. No, sir.

Q. Didn't it need to be flanged out?

A. I don't know. I got orders to flange it.

Mr. Boyle: I move that that answer be stricken, if your Honor please.

The Court: He said, "I don't know." What part?

Mr. Boyle: Well, the last part. He said, "I got orders to flange it." I move the last part be stricken out.

Mr. Davis: Just a moment.

The Court: It may be stricken.

Mr. Davis: May it please the Court, the question was, "Didn't it need to be?" and I think "I had orders to flange it," would be responsive to the question whether it needed it or not.

[fol. 533] Mr. Boyle: No, no.

(Exception by plaintiff.)

Q. You had been railroading for how long, Mr. Moquin?

A. Twenty years.

Q. And had you done a good deal of flanging out during that time?

A. Yes, sir.

Q. Along this same route?

A. Yes, sir.

Q. Now, what is your opinion as to whether the house track at the time of this accident or on that day needed flanging out?

A. That is not my work.

Q. Well, I am asking you now what is your opinion as to whether or not the house track was covered in such a manner that it needed to be flanged out?

A. I don't know.

Q. Well, do you mean to say that you are in a position where you cannot form and give us an opinion now as to whether or not you think that house track needed to be flanged out?

A. Why, if it hadn't needed it we would not have got that order to flange it.

Q. That doesn't answer my question. I am asking you for your opinion, Mr. Moquin, as to whether or not that house track needed flanging. You can answer it yes or no. What is your opinion of that?

A. Why, yes.

[fol. 534] Q. Do you and Mrs. Moquin have children?
A. We have no children, no, sir.

CHARLES L. HALSTED, re-called on behalf of plaintiff, in rebuttal, testified as follows:

Direct examination.

By Mr. Davis:

Q. Mr. Halsted, you were a witness yesterday, I believe, or the day before?
A. Yes, sir.
Q. Do you know who owned that warehouse to the south of this old crossing?
A. Yes, sir.
Q. Who did?
A. I owned it.
Q. Will you tell the jury when that warehouse was torn down?
A. In the spring of 1927.
Q. Do you know when that lumber was hauled away?
A. During that summer up until October when I hauled the last of it to build a hen house.
Q. Do you know whether or not in February, 1928, there was any of the building standing up eight or ten feet in the air?
A. There was none there.
Q. Did you remove the entire building in the fall of 1927?
A. I did.
Q. And was there anything left there at all?
[fol. 535] A. None of the lumber. There was one stringer or beam.
Q. Did you leave any of the lumber there?
A. None at all.
Q. Where did you take that?
A. I used it on my farm.
Q. And do you know of your own knowledge that all of the lumber was removed and none of it remained there?
A. I do.
Q. Now, during that winter do you know whether or not sleighs traveled over that space where the warehouse was?

Mr. Boyle: This is not proper rebuttal and incompetent, irrelevant and immaterial at this time of the case. We had the case opened up at one time to take additional testimony, and testimony was taken yesterday and these witnesses had a full opportunity to make their statements in court as to where the traffic was over that crossing and they have stated that the traffic over that crossing was at the old crossing.

Mr. Davis: Oh, no, they didn't.

The Court: Just a moment.

Mr. Davis: No, they didn't.

Mr. Boyle: That had been there. And at this time, if your Honor please, counsel is opening up an entirely different theory. If he is going to undertake now to prove that there was a crossing over the cement blocks instead of the old crossing that had been built up there, he is going into an entirely different theory and we object to having [fol. 536] the case opened up now for the third time on the plaintiff's side.

Mr. Davis: Counsel's statement is not correct. I have the same theory I always had. This witness testified that there was a crossing and he hasn't testified it was where the old crossing was. He has also testified, your Honor, that there were marks where the car had cut through the ice. To avoid any chance of it not being rebuttal, I will ask this question.

Q. Where were these marks which you found where the car was derailed where the car had cut through the ice, with reference to the cement blocks?

Mr. Boyle: This is objected to as mere repetition. That very question was asked of this man yesterday and he said it was right on that old crossing.

Mr. Davis: No, that is not correct.

Mr. Fryberger: Your Honor, I would like to suggest this, if I may, if the court will hear me. It seems to me that rebuttal is well known to experienced lawyers and to the court and that it is simply this, that John Smith testified thus and so, is that true or not. It is a denial of what went in. Otherwise, it is going into the case again. I think we all understand what rebuttal is. Now, the court was, I think, very lenient in allowing them to open up the case and to open it up again is not rebuttal.

The Court: The objection is overruled. The witness may answer the question.

[fol. 537] Mr. Fryberger: Note an exception.

Mr. Davis:

Q. Where was this ice cut down to the rail by this derailed car with reference to these cement blocks?

A. Right close to them.

Q. What do you mean by close to them?

A. Well, right next to that side of the building that was next to the track.

Q. That is your old warehouse?

A. Yes.

Q. Now, were these marks which you saw and where the car was derailed, where the car had cut through the ice, at the old crossing?

Mr. Boyle: Wait a minute.

A. No, sir.

Mr. Boyle: Wait a minute. Now, I move that the answer be stricken, if your Honor please, for the purpose of an objection.

The Court: It is stricken for that purpose.

Mr. Boyle: We wish to object to this, if your Honor please, as being incompetent, irrelevant and immaterial, not proper rebuttal and leading and suggestive.

The Court: Objection overruled.

(Exception by defendant.)

Mr. Davis: Were there any marks that you saw where the old crossing was where the car had cut through the ice at all?

Mr. Boyle: Just a minute. There is no issue on that. That is not rebuttal. Nobody has claimed that there were any marks down at the old crossing. We claim there [fol. 538] weren't any marks.

The Court: The witness may answer the question.

(Exception by defendant.)

A. There were none.

Q. Now, these marks that you had reference to, as I understand you, were to the south or north of the old crossing?

A. They were south of the old crossing.

Q. And these marks in the ice where the car had cut through the ice, where were they with reference to the derailed car, were they by the derailed car?

A. Yes, right at the corner.

Q. Now, do you know whether or not over the old crossing during that winter, whether there was any wood piled on the north side of the old crossing?

Mr. Boyle: Just a moment. This is objected to as incompetent, irrelevant and immaterial and not proper rebuttal.

The Court: Overruled.

(Exception by defendant.)

A. I do.

Q. And do you know how far to the south along the old crossing it extended, about how far?

Mr. Boyle: The same objection.

The Court: Same ruling.

(Exception by defendant.)

A. It was piled right against the Golmo building so it extended over the old crossing possibly five or six feet.

[fol. 539] Q. And was that the condition in February?

Mr. Boyle: The same objection.

Q. When this accident happened?

A. Yes, sir.

Q. You were asked on cross examination, "But this hard ice was just at the crossing there?" What crossing did you have reference to then, the old crossing or the temporary crossing?

Mr. Boyle: This is objected to as incompetent, irrelevant and immaterial and not proper rebuttal.

Mr. Davis: I think the witness has a right to explain it.

Mr. Fryberger: Calling for a conclusion.

The Court: Overruled. The witness may answer.

(Exception by defendant.)

A. The one we were using.

Q. And not the old crossing?

A. No, sir.

Q. Now, when this temporary crossing was made you may state to the jury whether or not there was a box car that was on the track to the south of the Golmo warehouse and over the old crossing?

Mr. Boyle: The same objection as last above, if your Honor please, and as not proper rebuttal.

The Court: Overruled.

(Exception by defendant.)

A. The box car extended over two-thirds of the old crossing.

Q. So when you drove your teams did you drive them north or south of that box car?

A. South of it.

[fol. 540] Cross-examination.

By Mr. Boyle:

Q. When was that box car there—at the time of this derailment, you mean?

A. No, sir, it was at the time we made this temporary crossing.

Stephen J. Burden, re-called on behalf of plaintiff, in rebuttal, testified as follows:

Direct examination.

By Mr. Davis:

Q. Mr. Burden, where was it with reference to these cement blocks of that old warehouse where the car was derailed?

Mr. Boyle: This is objected to as incompetent, irrelevant and immaterial and not proper rebuttal. We are certainly going right into the plaintiff's case for the third time.

The Court: I don't remember that this witness was asked this question.

Mr. Davis: I didn't ask him that question.

The Court: The witness may answer.

(Exception by defendant.)

Mr. Davis:

Q. Where were these marks where the car was derailed with reference to these cement blocks?

A. Directly east of it. On the rails east of the blocks.

Q. Well, east on the compass?

A. Yes.

Q. And where was the derailed car with reference to [fol. 541] those cement blocks, east of the blocks?

A. East and north a little, by the end of them.

Q. Was there snow over those cement blocks?

Mr. Boyle: That is objected to as not proper rebuttal, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

(Exception by plaintiff.)

James L. Brewer, re-called on behalf of plaintiff, in rebuttal, testified as follows:

Direct examination.

By Mr. Davis:

Q. Mr. Brewer, you heard the foreman this morning testify, did you?

A. Yes, sir.

Q. You may state to the jury whether or not at the depot at Cloverton you talked to the foreman of the section crew and complained to him of ice on the track?

A. Yes, sir, I did.

Mr. Boyle: Objected to as incompetent, irrelevant and immaterial.

The Court: When was that?

Mr. Davis:

Q. Prior to the accident, shortly before the accident, did you complain to the foreman of the section crew of ice being on the track?

A. Yes, sir.

Mr. Boyle: Just a minute. May we have a ruling?
The Court: Yes, the objection is overruled.

[fol. 542] (Exception by defendant.)

Mr. Davis:

Q. Where was this ice about which you complained to him?

Mr. Boyle: This is objected to for the reason that the plaintiff is going into his case upon the third theory, opening it up for the third time. It is objected to as incompetent, irrelevant and immaterial and not proper rebuttal. It is mere repetition.
The Court: The objection is overruled. The witness may answer the question.

(Exception by defendant.)

Mr. Davis:

Q. Where was this ice about which you complained with reference to these cement blocks?
A. Directly east of the cement blocks.
Q. Was that where the car was derailed?
A. Yes, sir.
Q. Before this temporary road was made, you may state to the jury whether or not there was any wood piled on the old crossing.

Mr. Boyle: The same objection as last above, if your Honor please.
Mr. Fryberger: It certainly is not rebuttal.
The Court: The witness may answer.

(Exception by defendant.)

Mr. Davis: You know it extended over a part of the crossing?
Mr. Boyle: Objected to as leading and suggestive, incompetent, irrelevant and immaterial and not proper rebuttal.
[fol. 543] The Court: Sustained on the ground it is leading.
Mr. Davis: Where was this wood with reference to the old crossing, where was it piled?

Mr. Boyle: The same objection.
The Court: Overruled.

(Exception by defendant.)

Mr. Davis:

Q. Where was it piled?
A. It was piled on the north side of the old crossing, partly over the old crossing.
Q. When you started to make that temporary crossing, you may state to the jury whether or not there was a boxcar over part of the old crossing.

Mr. Boyle: This is objected to as leading and suggestive, incompetent, irrelevant and immaterial and not proper rebuttal.
The Court: Overruled. The witness may answer.

(Exception by defendant.)

Mr. Davis:

Q. Was there or not?
A. Yes, sir, there was a boxcar extending over nearly two-thirds of the crossing, or more.
Q. Then, when you made this temporary crossing, did you travel to the south or north of that boxcar?

Mr. Boyle: The same objection, if your Honor please.
The Court: The same ruling.

(Exception by defendant.)

[fol. 544] A. To the south of that boxcar.
Q. Did you know about a building being there on this property?
A. Yes, sir.
Q. Do you know whether or not any part of that building was there at the time of the accident?
A. There was no part of that building there at the time of the accident.
Q. Do you know whether or not this so-called ditch, regarding which some pictures have been introduced, was filled with snow?

Mr. Boyle: This is objected to as incompetent, irrelevant and immaterial and not proper rebuttal, if your Honor please.

The Court: Overruled.

(Exception by defendant.)

Mr. Davis:

Q. Was that ditch filled with snow?

A. Yes, sir.

Q. And how high above the ditch was it drifted?

Mr. Boyle: The same objection.

The Court: The same ruling.

(Exception by defendant.)

A. About two feet.

Q. Above the ditch?

A. Yes, sir.

Q. And do you know whether or not that drift extended back over these cement blocks?

Mr. Boyle: The same objection and leading and suggestive, if your Honor please.

The Court: The witness may answer.

[fol. 545] (Exception by defendant.)

A. It didn't extend back as deep at the west side as it was at the east side, but it extended clear back over the blocks.

Q. Yes, and is that where you traveled with your teams?

Mr. Boyle: Just a minute.

A. Yes, sir.

Mr. Boyle: Just a minute. I move that the answer be stricken.

The Court: The answer may be stricken.

Mr. Boyle: This is objected to as leading and suggestive, incompetent, irrelevant and immaterial and not proper rebuttal.

The Court: Sustained as leading.

(Exception by plaintiff.)

Mr. Davis:

Q. You were down to Cloverton yesterday, I believe?

A. Yes, sir.

Q. Did you see four stakes marked out on the track there?

A. Yes, sir.

Q. And a photograph of that has been introduced in evidence. Where was this ice and snow or ice that derailed that car with reference to these four stakes?

Mr. Boyle: The same objection as last above.

The Court: The same ruling. You may answer.

(Exception by defendant.)

A. The ice was directly where the stakes were setting across the track.

[fol. 546] Q. And I will ask you if when you were down there you stated that to Mr. Fryberger?

Mr. Fryberger: Now, I object to that as incompetent, irrevelant and immaterial and hearsay.

The Court: Objection sustained.

Mr. Davis: And I will ask you with reference to the temporary road, where was that with reference to these stakes?

Mr. Boyle: Wait a minute. This is objected to as not proper rebuttal, incompetent, irrelevant and immaterial, and mere repetition.

The Court: Overruled.

(Exception by defendant.)

Mr. Davis: Where was this temporary road with reference to these stakes that you saw yesterday at Cloverton?

A. Directly where the stakes were setting.

(Plaintiff rests.)

Mr. Boyle: We have a motion to make, if your Honor please.

The Court: It is half-past five now and I will discharge the jury until tomorrow morning. You are ready to make that motion now?

Mr. Boyle: Yes, your Honor.

The Court: The jury is excused from further attendance in the court room until tomorrow morning at nine o'clock.

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Boyle: If your Honor please, at the close of all of the testimony in this case, the defendant moves the court to direct the jury to return a verdict in favor of the de-
[fol. 547] fendant. This motion is made upon each and all of the following grounds:

1. That the evidence adduced in behalf of the plaintiff, taken in connection with all of the evidence in the case, is not sufficient to warrant a finding by the jury that the defendant was guilty of any act of negligence proximately causing, or proximately contributing to the plaintiff's injury.

2. That none of the charges of negligence on the part of the defendant set forth in the complaint has been established by substantial evidence, as is required in actions under the Federal Employers' Liability Law.

3. That the evidence shows that the plaintiff's injuries were caused by his own acts in moving, or participating in moving, the car over the house track without ascertaining that such track was safe and in taking a position on the top of the car while it was being so moved and that such injuries were, therefore, caused solely by plaintiff's own negligence.

4. That the evidence shows that the plaintiff's injuries, if not caused solely by his own negligence, were caused by the joint negligence of himself and a joint employe of the same rank and authority in moving the car over the house track without ascertaining that said track was safe for such movement.

5. That the evidence shows that plaintiff knew, or in the exercise of his duty ought to have known, of the condition of the track in question and that the plaintiff assumed the risks of such danger as attended the condition of the track
[fol. 548] and the movement of the car from which he fell and sustained the injuries complained of.

6. That the evidence shows that the primary duty of the plaintiff required him to remain on the ground and protect

traffic over the crossing at the intersection of the public highway referred to in the evidence as the Main street crossing with the railway tracks as the cars were being backed over said highway, and to remain at such intersection for the purpose of protecting traffic as the engine and cars traveling in a westerly direction again passed over said highway.

Thereupon, after argument by counsel upon above motion, court was adjourned to 9:00 o'clock A. M. of the next day, Friday, May 24, 1929.

Court reconvened at 9:00 o'clock A. M. Friday, May 24, 1929.

The Court: With reference to a motion that was made at the close of the trial yesterday, after the jury was discharged, no ruling was made upon that motion at that time and the record will now show that that motion is denied.

Mr. Boyle: And may we have an exception to your Honor's ruling?

The Court: Certainly.

Mr. Boyle: We would like to hand your Honor some requests for instructions.

The Court: Court will take a recess until called to order by the officer. The jury may be at liberty either in the court room or the lobby until called.

After recess the case was argued to the jury by Mr. Boyle and an adjournment was thereupon taken to 1:15 [fol. 549] o'clock P. M. of the same day, Friday, May 24th, 1929, at which time Mr. Davis began his argument to the jury and which argument to the jury was as follows:

ARGUMENT OF MR. DAVIS TO THE JURY

Mr. Davis: May it please your Honor, Ladies and Gentlemen of the jury: You have been very patient for the last four or five days and I want to say that, with an experience covering close to thirty years as a trial lawyer in this state, it has been a pleasant experience to again come to Crow Wing county and try a lawsuit. I have never lost my faith

in human nature and the common sense of the common people. And I want to say I have never in the thirty years I have tried lawsuits appeared before a court who was more fair to both parties than his Honor, Judge Torrance. It has been a pleasure to try a case before a judge like him, and I say that with no idea of flattery, because, after all, the purpose of a lawsuit and the reason we erect this court house and the reason we have our courts of justice is not to play fast and loose with the rights of men and women, but is to get at the truth and do what is right, and no amount of blustering, no amount of chicanery and no amount of abuse or sharp practice can ever get the mind of an honest man or woman away from the true facts.

Now, this case has taken, to my mind, much longer than I ever dreamed it would take, and I want to call your attention to the fact that there has been no change of front [fol. 550] on the part of Mr. Moquin or his attorneys, for a year ago last May when we brought this suit we alleged in our complaint that this track was covered with ice and that that ice derailed the car. A year ago last May this railroad company was charged with notice of that, and what did they do? Did they bring a single witness, outside of one who draws a pay check from the Soo Line Railroad, to tell you there wasn't ice on that track? Not a one. Did they seek to go to Cloverton and bring men who live there and who work there and who had no reason to tell anything but the truth, to tell the short and simple facts? Oh, no. They rely upon their employes.

Now, we are all human. There is not a man or woman in front of me today but who is influenced by his or her environment, by association and by experience. We become like those with whom we mingle, we gain the viewpoint of those with whom we associate, and I want to say to you it would be impossible, perhaps, for a railroad lawyer to convince me that I was wrong and just as difficult for me to convince my honored adversaries that they were wrong. Why? Because we have that viewpoint. We may be prejudiced. We have had experience along those lines. That is why juries are impaneled, that is why men and women are called here from the walks of life that is why the court will charge you that when you weigh testimony you do not count witnesses and go by that alone, but that you subject it to the scrutiny of your judgment, your rea-

[fol. 551] son, your common sense and your experience. And that is what I am going to discuss with you people this afternoon.

Now, I bring to you today a man forty-six years of age, injured by the negligence of this railroad company, and he is asking no sympathy at your hands and he is entitled to none. He is asking simply the justice that the courts of this land should give to a man when he is injured by the negligence of his master. Let me call your attention to this fact, that when you, as a mother of children, find that a child of yours may have done something and you call him before you and you say, "Johnnie, what did you do?" and Johnnie turns his eyes and he won't look at you and he tells you a story that seems inconsistent and you make up your mind that Johnnie perhaps is shielding somebody. Now, the witnesses mounted the stand here, you saw them, you heard the words come from their lips, but it is not merely the words that come from their lips that count in a case alone. It is their manner of testifying. And let me say to this jury now that in the thirty years I have practiced law in my native state of Minnesota, I have never seen a more flimsy defense builded as the case went on than the Soo Railroad has tried to build in this case. During the entire argument of my able adversary he never once suggested to you that ice did not put that car off the track. Did he? Their defense seems to be that the ice was ten or twelve feet from where three men said it was, so I submit [fol. 552] you must find against Mr. Moquin.

The vital question in this case, men and women, is: Was there ice on that track and did that car hit that ice? If it did, of course, you know it would derail it. Did not the company have notice a year ago that that is what we claimed? And you sat in this court room when I went to the court and stated in the presence of this jury that we had a witness who agreed to be here and who did not come. I do not know why he did ont come. I do not know why, after he promised to be here, he failed to come. And what I did and what every honest lawyer should do, I sent the man who works for us to Cloverton to find that man and find out why he did not come. When he went there he inquired of men who lived there what that condition was and

we brought what every lawyer should bring to a jury, every fact in his possession.

Now, men and women, I want you to bear this fact in mind, as the court will tell you, this action is brought under the provisions of the Employers' Liability Act, an act of congress which provides that when a man is injured in interstate commerce he shall recover damages for injuries sustained, not entirely, but in whole or in part, from the negligence of any of the agents, officers or servants of that railroad company. That law did away with what was known as the fellow servant rule. That law did away with contributory negligence as an absolute defense. Before that time, no matter how careful a man might be, [fol. 553] if a fellow servant injured that man he was whipped out of a court of justice without a dollar. No matter how careless the master might have been, if the man was in the slightest degree careless that man, under the old common law, was whipped out of a court of justice without a dollar. And so congress, at the behest of McKinley, Taft and Roosevelt, passed this law that protects all men, protects every man who works for a railroad company in this land of ours in interstate commerce. And so the issue before you first will be this simple issue, was there any negligence on the part of the company by officers, agents or employes of the company?

Now, what is negligence? I think the court will charge you that negligence is the doing of something, or the failure to do something, which an ordinarily careful and prudent person should or should not have done. That is negligence.

Now, we have this situation at Cloverton that morning. They pulled in with that train with this order, and this is all it says, every word, and you cannot read anything into it but what is in it, directed to the conductor: "Do a good job of flanging today and advise what tracks you flange out. Finish the flanging on No. 50 Tuesday." Now, who had charge of that but the conductor? Who determined what tracks to flange if it was not the conductor? Why, the position of this railroad is that he said, "Here is the order, you go ahead and do this." Now, let us see. Circumstances never lie. Human beings may be mistaken and men's minds may forget, human minds and [fol. 554] human tongues may prevaricate, but circum-

cumstances can never lie. What happened during the testimony in this case? Mr. Carr was on the stand, wasn't he? What did he say? He said, "I asked Mr. Moquin if Rennie wanted us to flange the passing track." Didn't he? Now, will you ask yourself why did Carr ask Moquin if Rennie wanted them to flange the passing track if Rennie was not the man who gave the orders and determined what tracks to flange? Why did Mr. Carr say, "Did Rennie tell us to do this?" is Rennie was not the man in active charge of the work?

Now, Mr. Moquin takes the stand and he testifies before this jury that on that morning every bit of the flanging that was done at the five other stations was done exactly as it was done at Cloverton, by backing in the engine and then pulling forward and that the conductor was in full sight and saw that work done and never raised his voice against it. What does that prove? Why it proves one thing and only one thing, that that was the customary and usual way for those men to do that work. If it were not the conductor would have said so,—"don't back in,"—but he did not. He testifies that he knew they were backing those cars in at Cloverton and I said to him, "Well, didn't you know that was the wrong way," but no, he didn't claim that. He claimed that they had done that repeatedly and there was nothing wrong and nothing had ever happened in the history of this railroad with eight or ten inches of snow.

[fol. 555] Now, that is the order. They come to Cloverton. Mr. Moquin takes the stand and he says that he went over to the depot and that Mr. Rennie said to him, "You go over and tell Dan to back in on the house track and flange that and then flange the passing track." Now, why would that be reasonable? Because, as the testimony shows, Dan was the brakeman in charge of the engine. He was the one who gave the directions to the engineer—not Moquin. So there is every reason for that to be the truth, that Mr. Rennie said to him, "You go over and tell Dan"—who is in charge of the engine, the head brakeman on the engine, as the testimony shows, riding that engine—"to back up on the house track and then flange that." And Mr. Moquin goes over and delivers that order, walking over that crossing, that main street crossing.

Now, I come to another thing. There was introduced in this case a rule, Rule 102, with reference to the duty of Mr. Moquin to precede the car over the track. When the court charges you on that matter, the court will charge you that that rule is of no avail to the company and cannot be considered by you in passing on this case. And the testimony shows—undisputed, men and women—by Mr. Moquin that that rule was consistently disobeyed, constantly violated, in the presence of conductors and train men, for years over that road, and no railroad can make a rule and then allow its men to violate it and then shield themselves from liability by saying, "We invoke the rule," because if that were not so, would not Mr. Rennie, Mr. Carr, the general manager, the general road-[fol. 556] master, take that stand yesterday afternoon and say, "That is not so. That rule is not disobeyed." But as I say, the court will charge you in this case that that rule is not in the case and it is your duty, of course, to take the law from the court.

Now, men and women, another thing. We come into Cloverton. We have this order. We do the work the way it had always been done. There is not a word of testimony in this case that it had ever been done on that line any differently than that day, and the only purpose of trying to show that was to show contributory negligence in order to reduce the damages they owe this man in this case. And we back along that track through what kind of snow? Through snow, men and women, that was so soft that you might put it in your hands and make a snowball of it, and they want you to believe, they want you to believe in the face of the law of nature, that a car loaded with 400 ties, weighing 200 pounds apiece, a weight with that car of something like sixty-five tons, crunching down snow there, would derail. And they even had the temerity to put three section men on who testified there was no ice—two of them—on that track. Why did they testify to that? Why, they testified to that because they knew that the moment we proved there was ice on that track it would derail a car.

Now, before ever knowing a thing about their pretended defense, Mr. Moquin told you men and women that as he was on the ground there the conductor—the engineer and [fol. 557] the fireman came up there and looked at where

the car had cut through the ice and where it had gone over the rail. What did the conductor say? What did the fireman say? What did the engineer say? And what did Carr say? Every one of them said he couldn't tell you whether there was ice over that track. Isn't that peculiar? I asked the conductor, "Didn't you make an investigation there? Didn't you look to see what took that car off the track?" "No, sir." Do you remember his testimony, how nervous he was here on the stand, how he began acting with a smile, a sickly smile, and I said to him, "What did you go over there for?" "Why, I went over to find out where Moquin fell on the ice." "Well, why did you do that?" "Well, I shouldn't have. I should have stayed and given first aid to Mr. Moquin." "Well, hadn't you wired the dispatcher for orders?" "Yes." "And that is when you went over there?" "Yes." "Wasn't it your duty to find out, as conductor in charge of that train, what caused that derailment?" and he said, "Yes," didn't he? I said, "Did you make any effort to find out what caused this derailment?" and he said, "No." Do you believe it? I don't. I tell you back in his heart and in his subconscious mind what he thought—"Yes, I know that ice took that car off the track." What else proves it? I said, "and did you not make a report to the railroad company in an investigation, in which you said that ice derailed that car?" And he sat here and stammered and stuttered until he finally said to you men and women, "Well, I said that [fol. 558] possibly ice put the car off the track."

Now, let us analyze the human mind a moment. Why, would this man, Rennie, before this man ever started a lawsuit in the bosom of the railroad company, tell his master, the Soo Railroad, that ice possibly derailed that car if there wasn't any ice there? Just use your common sense, as Mr. Boyle says. Would you? If you saw an accident and saw a car derailed and there wasn't any ice there and you couldn't see where ice had ever been over the track, do you think you would turn to your master and say, "Ice probably derailed that car," when you couldn't say. "I saw it"? That is what they want you to believe in this case and I say no wonder the court says you must subject the testimony of men and women to the scrutiny of your judgment and your reason and your common sense.

Now, we go a little further. During the entire argument of Mr. Boyle has he suggested a single word as to what else would derail that car except ice? Not a word in his argument. He avoided it. Oh, this is his defense. He said, "We went down to Cloverton to find out where that crossing was." Well, men and women, when did they have this plat made? This was not made this week. Their engineer was down there and could see everything that the county surveyor or the city engineer ever saw. He made this plat. He measured this rail. He made it on the basis of fifty feet to an inch. He was there. They knew where that car was derailed. They marked it upon this [fol. 559] plat. And they made no effort in this case then to mark where the old crossing was. Nobody marked that. There is no crossing there now. You can take those pictures—that is a misleading statement. There is no crossing there now and let me say that no teams can go over that track now, but it had been there and it was there when your engineer made this plat, Mr. Boyle, and unless you were blind and didn't want to see he would have to see it if he was at the place of the accident. There was about twelve to fifteen feet along that track where it shows that the old crossing that had been there years ago had been taken up and the ties show where it was, and yet I wonder, I wonder, if that is all that you went to Cloverton for. Three men whom you have not dared to suggest to this jury would lie or perjure themselves, have come here, and with their hand lifted to God above them, have told these men and women the truth. And I wonder if you and Mr. Fryberger, Mr. Fullerton, the claim agent, the rest of you that went down to Cloverton the other day, did not try to find one single man or woman in that little community—not over a hundred people there—who would testify that there was no ice there. Now, mark you, that is peculiar. Let me show you another peculiar fact. Railroads are not run by fools. They are run by smart people. We know that when an accident occurs, as the conductor says, it is his duty to make an immediate investigation of what caused it. Did he? No, he did not. Why didn't he? What are you going to do with that kind of testimony? [fol. 560] We know that railroads do investigate accidents. Your common sense and experience tells you that. What do you think of a railroad company that would come in

here and take pictures day before yesterday at Cloverton, in the summer time, and not take enough interest to get the truth and take pictures the day after this accident or a week after the accident to show everything as it was. Is that fair? Is that the way you would want your rights determined? Let us suppose that one of you women were traveling to Seattle and you go to get off a coach at Seattle and there is a ridge of ice along there and as you step off you are thrown under the wheels of that moving car and your limb is severed and you lie in a hospital fighting for your life. The railroad company investigates the case and what would you think a year and a half after that when you were trying your case if the railroad company came into court and said, "Well, we never got a single soul to look at that ice except somebody that draws a pay check from us, and we didn't take a picture of it and we didn't measure it and we didn't do anything"? Would you think that was fair? Is that the way you would want a man's rights determined? That is what I am asking you men and women. It isn't fair. It isn't honest. It doesn't square with human experience. You know and I know that they investigate the causes of accidents. You know and I know that the Soo Railroad the day after this accident could have taken a photograph of that situation and shown exactly where that wreck was, shown where the ice was [fol. 561] if it was there or if it wasn't there. And they didn't do it. Why didn't they? What conclusion do you draw? There is only one and that is that they must have known the ice was there or they would have taken a picture of that situation. Common sense tells us that.

Then when Mr. Moquin had testified, they put upon the stand Mr. Rennie and you saw him. You had a chance to observe him. He is the conductor. You remember I asked him this, "Didn't you tell Moquin in the hospital that you had told the railroad company that ice derailed that car?" Do you remember his face? He sat here and hesitated and finally he said, "I don't remember. I won't say whether I did or not." Do you remember that? And then Carr goes upon the stand and I asked him that same question and he said, "No, I never did." Moquin says he said, "Ice derailed that car."

I have often wondered in the years I have tried cases for these poor devils who are injured, and for their widows

and orphans, who have to fight for their rights against these railroads, I have often wondered if the time would ever come when an injured man could come into a court of justice without having a railroad company try to fasten upon him that he was a perjurer and a liar. I wonder if it is true that the only time men can tell the truth is when they draw their pay checks from the railroad company. These men know where their pay checks come from, from the Soo Railroad, and I say it discounts their testimony, [fol. 562] the same as it discounts anybody else's testimony.

And what was the testimony against Moquin that there was ice on that track? Did he know at that time, did he ever dream that these section men could come here and tell the story they have? Now, mark you, the particular space, within inches or feet, where that road was doesn't amount to the snap of that finger if you will exercise your reason, and I will tell you why in a little while. The important thing is, was there ice on that track. Now, let us analyze that by the weight of the evidence. Mr. Moquin says it was there. The foreman whose duty it was to keep it off the track said there wasn't a particle of ice all along the track. Didn't he? That was his testimony. Young Maurer, the young man with the red hair, comes up here, the young man whom Mr. Boyle told to take the gum out of his mouth so he could talk, he says there wasn't any ice there, didn't he? Mr. Monson takes the stand and says there was ice there between the rails which had accumulated during the winter time up, as I remember now the testimony, to within one inch of the top of the rail and the flange goes down an inch and a half. That was Monson's testimony.

Now, what was done then? We asked this court, in the interests of justice, in view of the fact that a witness who had agreed to be here did not come, to go to Cloverton and there get this jury the truth. What did we do? We brought you three men, one man with a wife and eight little children, a hard working man, another man with a wife and five children, a hard working, honest fellow, work- [fol. 563] ing for whom? For the Soo Railroad. Undoubtedly today out there, Mr. Fryberger, on the tracks of your railroad at Cloverton, a section man. Surely he draws his pay check from the Soo Line, he wouldn't lie, because they

don't want you to believe any of the rest of them would. And they come here and tell you what? That there was ice where? Not necessarily where the truck went over alone, but they said that where the car went off the rails there was ice there. Didn't they? Every one of them, and every one of those three men, Mr. Burden, Mr. Brewer and Mr. Halsted, said there was ice where the car went off the track.

Now, I asked them this question about the roadway and let me see whether counsel was just fair with the jury. I think he meant to be honest, I think he forgot some of this testimony, because I want to take this occasion of paying my friend, Mr. Boyle, a compliment. He has tried this case well. I understand he is a Brainerd boy, raised in this community, and Brainerd can well be proud of him. But I want to also say that when he paid me the compliment, left-handed though it may be, that I am an orator, I am not quite sure he was in the bounds of the truth. I am always in earnest. It is true that sometimes when I talk to juries they have perhaps cried with me and sometimes perhaps they have laughed with me, but Mr. Boyle, they have never laughed at me. I want to say this, that in the trial of this case Mr. Boyle forgot some of the testimony. He tried to tie this man Brewer down that the crossing where the ice was was just exactly, inch for inch, [fol. 564] where the crossing was over this plat here. That is the crossing they marked with the county surveyor. He tried to tie him down to this point. Now, let us analyze that, not only from Brewer's testimony, but from the circumstances in this case. And so I call your attention to page 20: "And we just made this here crossing that winter and do every winter driving back and forth with teams when we are loading wood." Question: "Going over the track at that old crossing?" That is what he wanted to trip him on, and he said he didn't know a thing about it until he went down there to Cloverton, Mr. Boyle told you. What was his answer? "Somewhere right close to the old crossing, very near there." And it is within twelve feet of it. Here is a simple-minded, country man that says somewhere very close to the crossing, but not on the crossing. And yet I find a lawyer trying to defeat this man on that kind of a subterfuge. After putting this man Brewer back on the stand, Mr. Fryberger gets so nerv-

ous that he has to get up and he says this: "Was that warehouse torn down since the accident?" Answer: "The warehouse was tore down the next spring." Question: "After the accident?" Answer: "After the accident, yes, sir." "How close was that warehouse to this roadway that went by the Golmo warehouse, this old crossing?" Answer: "You mean the old crossing?" Showing that the man had in mind two crossings. "Yes, I am talking about this crossing that went by the Golmo warehouse; how close was that road to the warehouse, the Golmo warehouse?" [fol.565] And this man says, "The crossing we used or the old one?" What did he mean by that? Now, let us see what Mr. Fryberger did when the truth came out. Let us see how he acted. "Well, you can call it the old crossing, if you want to?" Mr. Davis: "Well, he is asking you which you mean." "I am talking about this crossing that is marked on this map." Now, wait. He didn't let him finish. "I withdraw that." He closed the man's lips. He closed his lips. What in the name of Heaven is a lawsuit for if it is not to get the truth? Why, when this simple-minded man said to Mr. Fryberger, "Do you mean the old crossing or the one that we were driving over?" if he were after the truth, why didn't Mr. Fryberger say that they were both the same place and let the man answer it. He came back on the stand and he testified here that the crossing they used was to the south of the old crossing.

Oh, let us see how the railroad prepared to meet that. Why, they brought in Mr. Johnson, their district roadmaster, from Minneapolis. Don't you remember, Mr. Boyle, when I asked his name, spelled it out, I presume because there are some of you on the jury who may be Scandinavians. He says, "J-o-h-n-s-o-n." That is the way we spell Johnson. I know because I married a very beautiful Norwegian girl, changed her name from that. Now, men and women, Johnson is a roadmaster. He goes down there the next day, doesn't he, and in order for Mr. Boyle and Mr. Fryberger to show that they could not drive across [fol. 566] to the south of this crossing, they erect the end of a building eight to ten feet high, sticking up without anything to support it, all that winter. Don't they? Johnson, the district roadmaster, said to you that the end of that building stood up there eight to ten feet. Well, now, what would happen if it did? There would not be a particle

of snow drift in where everybody agrees the snow was. Now, let us use our common observation. When drifts come they come, men and women, where there is no snow fence, nothing to stop them. Johnson shoots a fence up here ten feet high, that is what he does, and then wants you to believe it.

Now, let me show you what, more conclusively than anything else, proves that these men from Cloverton are telling you the God's truth. It is this: It is undisputed that at the place where the car went off the track there were snow drifts. There is no dispute about it. There were no snow drifts of any kind over this old crossing and nothing to cause snow drifts over this crossing which was an open space. There is where the drifts came and nobody claims that this old crossing was drifted over, and the testimony is not only that, but let me show you another circumstance. The testimony of the three men is that one car went entirely off the track and part of the second. Mr. Boyle says you must not believe that, you cannot believe that because they don't know what they are talking about. Well, now, are you compelled to take the testimony of Rennie and of Carr and of the engineer who took so [fol. 567] little interest that they couldn't even say if there was ice on the track? I don't know. Not one of them said there wasn't. Are you compelled to take their testimony in preference to three men who have no interest in the case and no reason not to tell the truth? What was the testimony? That this car went off at an angle of forty-five degrees.

And then they bring down old man Kline, a conductor who was there with this man, Johnson, but who couldn't see the end of the building eight or ten feet up. Nobody could see that but Johnson and he tells you. And I turned and looked at Mr. Boyle and I said, "Mr. Kline, how many cars were off that track?" Well, he said the first one all but one truck and the front trucks of the car next to it were on the ground. Now, the railroad men deny that. There is a reason for that. They don't want that car to get too far out here, but Mr. Kline said so and he had no reason to lie because he hadn't even had a chance, perhaps, to be prepared by counsel, for his testimony. He said so and I said, "But, Mr. Kline, are you sure that the trucks of that car next to the car of ties were off on the ground?" He

says, "Yes, it looked that way to me." Now, that is his testimony. Now, what does that mean? It means this, men and women, that when this car went off—as it is all agreed, nobody denies, nobody disputes that this car went off where these four red marks are, and if you will take this plat and find out and discover that when this car went off it did just what it would do, it hit that cement post [fol. 568] and pushed it away from its foundation. I want to say that in the trial of cases that I have tried for so many years, I have always felt that there is the over powering hand of a God that guides the destiny of mankind. It needs no more than that simple plat, the testimony of every man agreeing that this car went thirty feet away from the rail, and we find that the railroad company when they made the plat find a cement post just exactly where this car went off, tipped over to the west. I say that circumstances cannot lie.

Now, we come back again. Mr. Boyle says that these men were mistaken as to the roadway. Were they mistaken about this, men and women? Mr. Brewer said, under oath, that there is exactly where the car went off the track, the wheels had cut through the ice onto the rail, didn't he? Mr. Burden says the same thing, and the other man, I can't think of his name now.

Mr. Swanson: Halsted.

Mr. Davis: Mr. Halsted, the man who is working for them now, undoubtedly, on that section out of Cloverton today. At least, I hope so, working for the Soo Line. Told you that there was ice where the car went off the track. Now, what is the use of playing with words? What is the use of saying it was only two feet or three feet or twelve feet? Mr. Brewer told you it was right close to the old road, didn't he? Did they ask him, "What do you mean by right close?" So the man undoubtedly meant within ten or twelve feet of the old road, and when he tried to [fol. 569] explain it, Mr. Fryberger closed his mouth. He would not let him explain when he said, "Do you mean the old crossing or the crossing we used that winter?" What does that mean? That does not mean that they were not the same and yet they want to beat this man on that kind of technicality.

Now, the thing for you to determine is this: Did those three men from Cloverton come here to lie, did they come here to raise their hand to God above them, men with families, men who work for a living, men with no interest in the case, men who never saw and knew Noah Moquin, did they come here to lie? Did they come here to say that there was ice on that track when there wasn't? If so, why would they come? Why would they come? I say no honest man or woman can ever explain that, and if they told you the truth that where this car went off the track there was ice, then it is negligence.

Now, let us get to one other point in this case. Negligence is the want of ordinary care. This man is told by the conductor to tell Dan to back up on the house track and then come through and flange it and flange the passing track, and he goes back and gets on that car. Now, he was not injured because he didn't walk in front of that car over the crossing, was he? He would not have been injured at all if there had not been a drift of snow over hard ice over those rails. That is the only thing that injured him. You know that and I know it. You either have to go out, men and women, and find that these three men from Cloverton [fol. 570] lied and the only men who can tell the truth are these section men who are responsible for this very accident or else you have to find that this plaintiff ought to recover, and I say the time, I doubt if it comes, when three men looking as honest and hard working and square as those men, come into a court of justice—working over there at Cloverton in the wilderness, taking care of their families their wives and their little children, they come here to you men and women and they have told you the living truth of the living God and no man knows it better than Fryberger. He has sat in this case, one of the keenest, able corporation lawyers in the great state of Minnesota, a man cool, calculating and who has been the guiding spirit in this defense. He has sat here, men and women, suggesting to Mr. Boyle what steps he should take and what he should ask. There is not a man, there is not a woman, on this jury who does not know that Mr. Brewer and Mr. Halsted and Mr. Burden told you the truth when they said there was ice under the wheels of those cars where they went off the track.

Now, we come to one other question. Mr. Moquin was on top of the car, and the defense of assumption of risk

will be given to you and I want to discuss it briefly. Assumption of risk, as I understand the law applicable in this case, is this: That a man assumes the usual and ordinary hazards of his occupation, those dangers which are apparent to him, but I think the court will charge you that he cannot assume the dangers arising from the negligence of [fol. 571] any of his fellow servants unless he is aware of the danger and appreciates the risk, and that is why there is no assumption of risk in this case. Mr. Moquin is going back on this car over what? Over smooth snow, drifted in there, no reason in the world to believe there was ice there to derail that car, no reason to believe there was anything dangerous because they had done it with the engine five times before this morning, and as Mr. Kelly said, they had done it time and time again, everywhere over that railroad, and never been disciplined for it. Not a single time can you find a man disciplined for backing those cars in there. Now, where is the assumption of risk? Is there a bit of evidence that you can go out and say, "Well, Mr. Moquin knew that there was ice there?" The law is that a servant has a right to assume that when he is sent into a place to work those having charge of it, as these section men, have performed their duty. Those are the men who are responsible for this accident. And what happens? He comes into a place of apparent safety, into a snow drift not over a foot high at the most, with snow that was so soft that you could melt it in your hands and make a snowball out of it, and he backs in there and strikes this ridge of ice of ten feet and off he goes, and the issue would be the same today had he, when he fell, been crushed to death under that moving car and his widow were seeking to recover. It would be the same issue, whether there was ice that derailed that car, and I am wondering if an intelligent jury, had he been killed and the evidence being as it is in this [fol. 572] case, would say that his widow should go out of here without a dollar. Just bear that in mind.

This railroad company has tried this case cleverly. They have tried to raise a cloud of dust against a case that I cannot for the life of me see why they are fighting. Not only that, but the court will charge you on assumption of risk that he cannot assume risks arising from the negligence of fellow servants, unless he knows of that danger, and he did not know about it. The ice was covered with snow, so

he goes in there. Now, that is all there is to assumption of risk.

The court will also charge you that the mere fact he was injured, that he fell from the car, is not enough to prove liability. That is true. If all we did was to prove by Mr. Moquin that the car was derailed and that Mr. Moquin fell from the car, that would be a mere accident. We have to go further. And that is why, men and women, a year ago last May, when we knew from Mr. Moquin what the facts were, we alleged in our complaint and proved in this case that there was ice on the rails. That is negligence. How is it proved? By the last witness, the general manager of the railroad company, Mr. Urbahns. When I asked him yesterday afternoon, "Ice upon the tracks is a very dangerous thing?" he said, "Yes, sir." "It is not only likely to derail cars, but engines as well?" he said, "Yes, sir." "It must always be kept off the top of the rails?" "Yes, sir." Is it ordinary care to leave it there? Not only that. Let [fol. 573] me ask you this: Do you believe Mr. Brewer lied to you when he told you that he went to the depot and talked to that foreman and complained about the ice and asked him to remove it? Do you think he did? Did you notice the foreman when I asked him those questions? At first, "I don't remember whether I had a talk with him or not." "I don't remember." They couldn't remember. Isn't it peculiar, men and women, that the conductor, the brakeman, the engineer and the fireman ran away from the scene of this accident and cannot tell you whether there was ice there or not? Isn't that strange, you ask? Isn't it strange they wait until summer time, in the good old summer time, to take a picture of this situation that doesn't show at all the condition that was there in February of 1928? So I say on that question, when the court charges you the mere fact an accident happened the plaintiff cannot recover, we have proven negligence.

The court will also charge you on proximate cause. I want to discuss that briefly with you. Proximate cause, as I understand the law, is that cause which produces the accident, that thing but for which the accident would not have happened. Now, the accident would not have happened if there had not been ice on that track. You know it and I know it and the railroad company knows it. So it does not make any difference if Mr. Moquin did not walk in front

of that car across the crossing. That did not derail the car. What caused the car to go off the track? Ice. Ice on their tracks and that is the proximate cause, under the law. [fol. 574] Now, men and women, we have another rule that the court will undoubtedly give you, and that is as to the burden of proof. Burden of proof in these cases means not merely, as I inquired of this jury, the greater number of witnesses, because if that were so then every lawsuit would depend upon the longest pocket book; it means what that testimony weighs in your minds.

The court will tell you that you have a right to take into consideration the interest of Mr. Moquin in this case in weighing his testimony. It is right that you should. He will also tell you that you have a right to take into consideration the interest that any other witness may have in this case. He will tell you that the fact a man is working for a railroad company isn't any reason why you should disregard his testimony, and that is true, but if that man, working for the railroad company, tells you an unreasonable story do you have to believe it? There is Mr. Johnson who puts up one end of a building eight or ten feet in the air. It is true the court is going to say to you in a request of defendant's counsel that the fact he is working for a railroad company does not justify you in disregarding his testimony, merely because he works for a railroad company, but if his testimony is so unreasonable and does not appeal to your sense of common honesty, why, of course, you will disregard it. So I say when you consider the testimony of these railroad witnesses you have a right to take into consideration that their jobs are there, that their pay checks are there, that they are working for this railroad company [fol. 575] and it may influence their judgment. It is this that made everyone of the train crew forget to find out whether there was any ice on that track, isn't it? Isn't it funny, every one of that train crew, right down there where the fellow was hurt, ought to know above anybody else what was there and can't tell you a thing about it.

Now, men and women, those are the issues in this case and practicaly all of the issues except the measure of damages, and I come to that question. Oh, yes, there is another very important matter Mr. Swanson called to my attention. The snow was soft there that day of the derailment, wasn't

it? We had Mr. Kelly here on the stand the second time yesterday. Do you remember when I was trying to examine him as to these wheels and the marks? I don't know whether you folks believe in fortune telling or not. I don't know whether you go and read your fortunes in the bottom of tea cups or use a pack of cards, as some women do to try to see what is going to happen, but I tell you the best way would be to get a roadmaster of a railroad who goes to a wreck where there are fifty cars off the track, just simply go there and tell you what was the first car, the second car and down to the fiftieth car that went off that track. He is a dandy. You don't believe it. Kelly doesn't believe it himself. He can't believe it. It is remarkable. Why, men and women you could see a train of cars derailed this afternoon and see the first car going off and the next rolling by the next, pushing the next one off and you couldn't [fol. 576] with your own eye sight tell and yet he has the temerity to tell you men and women of Crow Wing county that he could tell by those marks where the car went off first and the next. He wasn't there, but he could just tell that anyhow from his experience. Does it sound reasonable? Does it sound fair? Why, men and women, he says this rail has been there for seventeen years. He don't know when the marks were made there. He didn't, as I understand it, know about it after the accident. But here is the significant fact that I asked him and it is a fact that this railroad company can never get away from, and that is this, and I say these three men are telling the truth as to where those cars went off the track and how they went off, because Kline bears them out. When those cars went off the track they would go over the ties which extend on each side of the rail and they would go down onto those ties and they would make marks in those ties unless the ice was so hard that they rolled over it into that ditch. You know it and I know it. And what does that prove? It proves that right there where that car went off the ice to the left there, to the west, was so hard that when the car went off and over the rail it rolled onto this cement post and into that ditch and never went down, and yet Mr. Boyle says they could not drive there because there was a ditch. Why, it was a ditch that was filled with snow, as some of them say, two feet over the top of the ground and frozen and melting

and frozen and melting. What other conclusion can you draw as reasonable men and women? Why is it that there [fol. 577] wasn't a single mark of a flange on the ties? Oh, Mr. Kelly says it would not cut through snow, cut through ice, but it would not cut through snow, snow so soft that you could crush it in your hand and make a snowball out of it, and it would not go through that onto the ties, but it would go through ice, and that is the kind of a defense that this great railroad company and these people and astute counsel bring to intelligent men and women. Do you want your case tried on that kind of a theory? I say that the very fact that there were no marks on the ties, as you apply any common sense or logic to the situation, only proves one of two things, or in fact only one, and that is that the snow there that had drifted in must have been so hard that the flange of that wheel could not go down to the tie and mark it. Well, if that is so, could a sleigh go over there? Just ask yourselves. And that is the way they are trying this case, trying to say the snow was there and there was a ditch there. And these pictures may be very misleading. I ask you by all that is fair and common sense, the first thing you want to bear in mind with these pictures is that they were taken day before yesterday. Mr. Boyle did suggest that he had a bunch of pictures taken—I don't know when—I think it was last October, that he handed to me without my ever seeing them and said, "We might as well put these in." I says, "You better lay the foundation by the party who took them." He did not put those in. I do not know what they show. Probably the same thing, but in any event they show [fol. 578] that this ditch is cleaned out every spring of pulpwood and the débris taken out, so that the ditch does not show like it was and is not in the condition that it was at the time of this accident. Now, bear in mind in this very case there is the cement post that was pushed over and there are the stakes and there is the way the car went. Now, we did not put that post over there, we didn't push it over in the same direction the car pushed it. Those are circumstances that cannot lie. Now, that is the ditch, but that is not the condition of the ditch in February, 1928. You bear that in mind. Then it was filled with snow two feet over the top.

Another thing. After Mr. Brewer had said to Mr. Fryberger, "Which road do you mean, the old crossing or the

one we were using," and Mr. Fryberger says, "I withdraw that," Mr. Brewer took the stand and I asked him this question, if there had been a box car there across that crossing and he said there had and it extended two-thirds of the way across. I want to say this to this jury: I did not know those men when they were brought here. I put them on the stand and let them tell their story and I think they have told you the truth. I do not know them and probably will never see them again as long as I live. Mr. Brewer says to you that this car was two-thirds over the crossing and they drove around to the south of the car, starting that road. Undoubtedly part of it went at the south end of the old crossing and extended on ten or twelve feet down and ten [fol. 579] or twelve feet down—this is five feet to an inch, this plat, as I understand—brings it right to the derailment, right where the car was, and where they crossed there was ice. That is the testimony in this case. Not only that. Mr. Brewer and Mr. Halsted say that the ice was so thick where this car went off the track that about four or five days before when they were moving a car they took two teams to pull the car over the ice, skidded over the ice, didn't even get down to the rail. Is that the truth? Is there any reason you should say those men lied to you? There was no motive. You have to have motive, you have to have interest, you have to have intent, before you discount the testimony of honest men and women.

So, men and women, that is this case, with one exception, and I will try not to take up too much of your time, although I want you to be patient with me because this is an important case to the railroad company and to Mr. Moquin.

We come now to the measure of damages. What should this man recover? Now, I know something about juries. I think I know something about the difficulties of trying these cases. I think I know something about the difficulties of a man, single handed, fighting a powerful corporation. I think I know something of the feeling of superiority that sometimes reposes in the breasts and hearts of men who represent corporations. I think I know somewhat the handicaps that may surround a man who will fight for what they call the underdog. I have tried cases under those laws [fol. 580] as far west as Montana and as far east as the state of Ohio. I have addressed juries in those states in behalf of injured men and the widows and orphans of men

who were killed, and I want to say to you men and women of Crow Wing county, never in my life have I seen as ingenious and dishonest a defense as is put up in this case.

Here comes a man in the prime of life, forty-six years of age, giving to this mighty railroad eighteen of the best years of his life, working for them, and because of their negligence and because of the laziness of those section men, he is hurled from the top of a moving car, fourteen to twenty feet, weighing 212 pounds, landing on his feet on the solid ice and ground below and failing on his back, and but for the providence of Almighty God, had he not turned himself away, he would have been crushed under the moving wheels of that car. And we find a railroad company coming into court to fight that man and send him out of this court room stamped as a cheat and a fraud. Moquin has told you the truth. If these three men from Cloverton had never come here, the testimony of that simple, honest man, standing alone, would be enough to convince any honest man or woman that the Soo Railroad, in common decency and common honesty, if they possess it, should pay this man. I want to say to you men and women I do know what it costs to fight a railroad. It is hard. It is not easy. It is hard. I know that oftentimes as I try these cases—and I am not an extremely religious man, but perhaps from a good [fol. 581] mother I have learned at times to even ask the aid of a Divine Power to give me strength to present cases honestly. I have passed the half century mark. It will not be many years, perhaps, before I will be through trying lawsuits. I love to try them. I love the fight, but it is hard, and it is hard because of the neglect. Why couldn't this railroad have photographed that track? Why didn't they? Just ask yourselves when you go out in the jury room. Why did they wait until October to photograph that track? They knew the car was off and that a photograph taken the next day would show everything, didn't they? But they didn't do it. Is that fair? Is that the way you want your case determined if you were injured or your husband was injured?

Now, we come again, as I say, to the question of damages. Mr. Boyle, in his magnanimity, I presume—I can't imagine what else—this morning suggested to this jury that you ought not to give him over $6,000.00, and you ought to cut that. Well, I want to tell you if there is a man or

woman on this jury that wants to listen to that kind of argument in a case of liability to give this man that amount, go out there and don't you give him a red penny. He is not asking for a dollar he has not lost. This man is not asking for a red cent that is not his. But by the eternal gods he is entitled to what he has lost and it is not $6,000.00, as we discuss this testimony. And let me tell you if this jury should bring in $26,000.00 the first men to send a wire to Minneapolis and laugh would be Fryberger and Boyle.
[fol. 582] Let us analyze this case. At first blush you will say he is a brakeman and he has only got a crushed foot and he can do other work. All right. Well, let us take life as it is. Let us take any of you men or women. Let us take a man who is a doctor or a lawyer or a preacher, or a teacher, and through some trick of fate, over night, by an injury, he cannot follow his chosen profession. What will he do? Just stop and think. What will he do? Where will he turn? How will he earn a livelihood to protect his wife and family? It is easy enough to say, "Why, he just had a crushed foot." Let me give you an example and we will see where damages run. Let us suppose one of you ladies had spent twenty years of your life to become an accomplished musician and that you were out at Seattle on a train and that some blundering brakeman of the Soo Line shut the door and injured your finger so that you had to take it off two joints from the finger tip, and that is all the injury you had. Now, let us suppose you went to try that case and that these people, railroad lawyers, come in and say to the jury,

"Well, it is true that this woman was injured, but it is her fault, the brakeman is not to blame, the conductor gives aid, so he isn't, and all in the world to prove it is the poor woman." But suppose the jury says, "We will give her damages, all right. What will we give her? Well, for that finger, good gracious sakes, a thousand or two thousand dollars is plenty." That would be true if she had not lost her vocation in life. Don't you see? That is where the damages come in. Why, say that woman was an accom-
[fol. 583] plished pianist and was earning $3,000.00, a year playing in concerts and she lost that finger and she can never go to a piano again and earn her living. Is her loss merely the loss of that finger? Oh, no. It is the loss of her livelihood. That is the point I want to drive home to

you men and women. That is the thing that counsel forgets. If you, Mr. Boyle, or you, Mr. Fryberger, or I, myself, tomorrow, by an injury, were deprived of my ability to practice law, the damage would not be merely the physical damage. It would be the damage that deprived me from carrying out and fulfilling my chosen profession. That is the point. Why, men and women, in the case where that girl would lose her finger, as a musician the damages she would sustain would be the amount she was earning per year as long as she could have earned it. That would be fair, too, wouldn't it? Now, that would amount to a great deal, so I can imagine, unless the matter is discussed honestly and fairly with the jury, that someone on the jury will say, "Well, that is a great deal of money." Yes, it is. And some other man or woman on this jury may say, "Well, it is a great deal of money." Well, let us see if Moquin can never do anything else. He can do something else. There isn't any doubt that he can never railroad again. Even taking Dr. Kuth's testimony, he said it would be dangerous to that man's life to climb box cars or walk on them. "Oh, but," says somebody, "he can be a conductor." Well, he has been waiting sixteen or eighteen years and he has had one month as a conductor on the Soo Line. [fol. 584] Now, then, what else can he do? Where will he turn? What work will he get? Crippled as he is, and permanently crippled. Mark you, there is even an agreement of the doctors that so far as the lateral movement of that foot is concerned it is fifty per cent gone. Fifty per cent gone. All right, let us take again the example of that girl. She was earning $3,000.00, a year. And I can hear a railroad lawyer say to a jury, "Why, men, this lady is a fine woman. She has lost a finger here. She should have damages for it. Give her two or three or four or six thousand dollars and then take part of it back for contributory negligence and let us be fair." And I can hear that lawyer say also, "Why, she can go out and work. She can scrub floors. She can wash dishes. She can go to work waiting on a table." Of course, she can, but she has lost her livelihood, hasn't she? She devoted twenty years to learning that trade. This man devoted twenty years to learning to become a brakeman. Now, his normal expectancy is twenty-five years, and I introduced that because that is the average

experience of mankind. Twenty-five years that he could have lived and earned $3,000.00, a year, or $75,000.00, he could have earned. That does not mean he is entitled to $75,000.00. Why? Because if you gave him the full amount of $75,000.00, he would then have the principal and interest, and four per cent which would be a fair return for money with an uneducated person investing it, would give on $75,000.00, exactly $3,000.00, a year. That would be unfair [fol. 585] to the railroad company. Why? Because he would be having the interest and the principal. So we will find out now what he has really lost.

Now, some of you men and women may say, "Well, Mr. Davis is asking for too much money." I am not asking you for a dollar in this case except what the evidence shows this man should have, and if that is a large amount I want him to have it and the Soo Railroad ought to want him to have it. And I want to digest and analyze this evidence to show you that he is entitled to very large damages and the reason for it is he has lost his vocation.

Now, we have introduced the expectancy table and the court will charge you regarding this expectancy table as follows, I think: That you are not bound conclusively by the expectancy table, that a man may die before his normal expectancy and he may die afterwards, but let me ask this jury, if we were standing in front of you and saying to you men and women here to go out and say that he would live longer than that average experience of mankind, we would be asking you to guess, wouldn't we? If we asked you to so guess he will live ten years longer, you would be guessing, and when the railroad company says to guess he would live ten or twenty years less, they are asking you to guess, and I say what better evidence has there been presented to this jury than the average experience of mankind? The normal expectancy of this man is twenty-five years that he can never railroad, twenty-five years that he has got to go through life hobbling and suffering pain, even [fol. 586] as Dr. Boyer says that he would undoubtedly suffer pain because of this ankle for many years. Dr. Rees, says permanently and nobody questioned that evidence. Now, that is the testimony, but I say take the testimony of their own doctors, what is the loss? Let us say that he can earn something somewhere else. Let us analyze that. It has appeared by Dr. Rees, if you believe him, that he

can never railroad again. Dr. Schnell says that he can do some kinds of railroad work, such as a conductor, but not as a brakeman. Now, he don't have a run as a conductor and he never could get it, because there isn't a railroad company in the world that would hire him in that condition and you know that. So what will he do? I can see him, along with thousands of others marching, dragging himself up to the doors of the factories and the work shops of America, and I can see him applying for work and by his side see thousands of men out of employment, with two strong arms and two solid legs and a solid back, in competition against him. Who is going to hire him? Just stop and think about it. He is handicapped for life. He goes out into an economic world, men and women, handicapped by the negligence of his master and when he raps at the door and says, "I want to work," by the side of him is a strong man who says, "I want to work and I will work for the same wages and there is not a thing the matter with me," who is going to be hired? He could perhaps get a job watching crossings for the Soo Line at $60.00, a month. [fol. 587] Let us be fair. Let us say he could. Let us say that Mr. Fryberger, in his magnanimity, his charity and graciousness, would say, "We will give him a job at $60.00 a month on the Soo Line." All right. He was earning $250.00, a month, wasn't he? What has he lost? He has lost, then, $190.00 a month. Let us be fairer than that. Let us go along and say that this man could earn $125.00, a month. Now, when you do aren't you more than fair by this railroad company? Aren't you more than fair to say that a man whom Dr. Boyer says and Dr. Kuth says can never railroad as a brakeman again with safety to his life, has taken and given twenty years of his life to that work, aren't you fair by this railroad company when you say to them, "Well, we will just simply cut what he was earning right in two and say that he can earn $125.00 a month"? I don't know where he will earn it, do you? Do you think he could go into a factory and get $125.00 a month? Do you think he could go and run a farm and get $125.00 a month? Oh, no. Let us be fair. Then what does it mean? It means that if he has lost that, if he has lost that amount, just half, it means that if he has lost half of his wages and you are fair by this company and he has lost $125.00, a month for twenty-five years, he has lost $37,500.00, giving

the railroad company half of what he is earning now. Why, men and women, six months from now he has already lost $4,800.00—three months from now. Three months from now the wages alone, outside of his pain and suffering that Mr. Boyle so graciously told you he was entitled to receive, [fol. 588] he has lost practically $4,800.00. Nine months from now the $6,000.00, that Mr. Boyle suggested will be all gone and Boyle suggests you take some of that away from him. Well, I want to say before you bring in a contemptible verdict of $6,000.00, come in here and tell Moquin to go out of this court room without a dollar. Let us be honest about these matters.

This man is a cripple for life. He has lost his vocation in life. And I say to you men and women that if one of your farmers shipped a carload of cattle over the Soo Line to St. Paul or to Winnipeg and you paid $12,000.00 or $20,000.00, for those cattle and they were lost in a wreck, what would you think of a jury of men and women who would go out in the jury room and say, "Well, let's get together. We won't give him what he ought to have. We will give him about half of what he ought to have. It is the last case on the calendar and let's go home." That is the way sometimes juries do. I do not think you will. I do not think you should.

Now, let us take it again. In addition to his foot, there is his back. I do not know how badly it is injured. I only know what Dr. Rees says. He struck me as a pretty able doctor. If he is telling you the truth he has an injury in the back. If he is telling you the truth his right arm will bother him as long as he lives. Now, I asked these doctors, why is it, fifteen months, mark you, that this man has had that injury, and all of them agree he has it. None of them [fol. 589] say he hasn't. There hasn't been any suggestion by anyone that this man is a faker. There isn't a thing against him. Can you tell me that would exist for fifteen months and not be serious? Keeping on that way, so that there is a paralysis and a numbness there till he cannot grip, as he says, like he normally would.

Now, that means this, that in addition to both feet, he has a hand that bothers him in earning a livelihood. I say, men and women, when you come to analyze the questions of damages I wish you would bear in mind that if he received today $37,500.00, and put it out at four per cent all

he would get would be one-half of what he was earning. Just one-half.

Now, there is one thing I know from experience in talking to jurymen and jurywomen, and that is that frequently we get preconceived ideas of what we should give or what we should do. I want to say this. In this case it is important to Moquin and important to the railroad company. It would be a terrible thing if you men and women went out and said, "Oh, well, we will compromise. Instead of giving this man, $37,500.00—I think the evidence entitles him to it—we will give him around $20,000.00, and compromise our verdict." I think it would be a terrible thing if in ten years from now you, in the same condition, could not earn a livelihood, could earn probably $60.00 a month. Is there any reason why you should do it? Is there any reason why you should take away from this man one cent that he has coming? I say to you men and women I have tried these [fol. 590] cases long enough to know human nature and before this jury brings in a verdict of that kind, as a tribute to the line of defense the Soo Line has put in here, don't bring this man a dollar. Send him out stamped as a fraud, a cheat, a faker, rather than give him a verdict that he is not entitled to.

Then we come to the question of contributory negligence. Where was this man negligent? What did he do so far as the derailing of that car is concerned that any other man would not have done? It is true the court will charge you in this case that if the railroad company were negligent and the man himself were negligent, then you would reduce the damages in the proportion that this man's negligence, if any, bears to the combined negligence of both parties, but before you can reduce that damage, before you can take one penny away from that man, the defendant must convince you by a preponderance of the evidence that he was guilty of contributory negligence and there is none in this case.

And I say to you men and women—this case goes to you now—that I have appreciated your patience in the trial of it, I appreciated your patience yesterday as we had photographs and measurements that had no more to do with the real fact of whether there was ice or snow upon that track than the moral law. I have appreciated the patience of this court, I have appreciated the patience and

forbearance of this jury, and I want to say to you men and women I want you to take this man, Noah Moquin, I want you to consider his case as you would consider any other [fol. 591] man's case. Oh, says Mr. Boyle, in giving damages don't give any more than you would for some man in Crow Wing county. I accept the challenge. If there were a man in Crow Wing county who had devoted twenty years of his life to learning an occupation, to learning a trade, and he had been robbed of that trade by the negligence of his master and he lost $37,500.00, you people would give the man in Crow Wing county just what he had lost. Now, there is no reason why you should not give this man, because he is a stranger to you, the same amount.

Let me say this. There is a five-sixths jury law in this state. I hope this jury agrees, but I want to urge this jury that if the men and women of this jury believe that this man should receive $37,500.00, and if someone should say there was slight contributory negligence on his part, I say before you bring in a verdict that will be an insult, that will leave this man a pauper and beggar to go upon the streets, I say to you men and women who believe in justice and right and fairness, stand out there your twelve hours and write your names upon the verdict and bring it in and let the world read it. I am not here pleading for sympathy. I am not here pleading for anything but the common justice that a laboring man is entitled to, and the time must never come, men and women, when a man who works for a living, when a man who works for a great and mighty railroad company, cannot walk into the courts of justice and there have his rights determined as fairly and as honestly as [fol. 592] though he were the highest man in the land.

Men and women, you take this case and when you bring it in—I will not insult your intelligence by reminding you of your oaths. It sometimes amuses me to hear counsel, as Mr. Boyle, say, "You took an oath to do this and that." Why, of course, you did. Why remind you of it. You take this case and when you write that verdict write it with an eye to justice and to honesty and to fairness, and when you bring your verdict in that man, stranger though he may be to you, will be waiting here to receive your verdict. It is not a matter of importance whether the verdict satisfies me or not. It is not a matter of importance whether the verdict satisfies Mr. Fryberger or Mr. Boyle, but it is a matter

of importance that you do not take a dollar away from this man that he has lost, and I want to say that he has lost, if you are fair by this railroad company, $37,500.00, if you say he can earn half of what he was earning before he was hurt, and if you even went further than that and said he could earn two-thirds of it, he would be entitled to practically, $26,000.00, if you gave the railroad company all the leeway, and yet I am surprised to hear counsel suggesting the miserable amount he did suggest, and I say again before you bring in that kind of a verdict don't bring in any. I would rather see this jury disagree and if this fight must go on for two years longer I can only assure that man and this jury that if God lets me live, he will find me fighting to get him justice in the courts of this land, and that is [fol. 593] what he is entitled to. And I want to say if this Soo Railroad could give back to this man his good health, could give back to him the ability to work, could give back to him the ability to railroad, we would take every dollar that the Soo Railroad ought to pay this man and we would hurl it back into their faces as a worthless rag. There is no amount of money that can compensate this man, not only for the loss of wages but for the pain and suffering. Now, the court will tell you that you cannot measure pain and suffering like you would count eggs or weigh butter, but he is entitled to pain and suffering in whatever amount he has suffered pain and suffering. You have heard his good wife go upon the stand and tell you how, night after night, waking up in the stillness of the night, she has rubbed his back, and night after night she has rubbed his limbs, tried to get them well. That is all damages. Would you have that damage alone, outside of his loss of earnings, for less than ten thousand dollars, and it to go on, as Dr. Rees said, the rest of his life? Add that pain he has suffered and you have $47,500.00, and then be fair if you want to to this railroad company and say he was equally negligent and you would have twenty-five to twenty-six thousand dollars that the man would be entitled to by giving the railroad company everything.

Now, you take this case. One thought I want to give you and that is this: I think Moquin has told you the truth. I have found this out, I think, after fifty years of living— [fol. 594] sometimes I think I have lived 250 years, but I am fifty-two—I have found this out, that the men who

work and the men who toil, not only with their hands, but with their brains, the men who take life seriously, to them life means more than mere accumulation of wealth. The men who love their families, the men who go on through life grubbing, are the men who, like this man, would rather be working than anything in God's world. That is all this man ever knew. That is all he ever knew, was work. And now he can never railroad again. So I say when you take this case bring in a verdict that meets with the approval of your conscience and your judgment, and I want to say in leaving you men and women of Crow Wing county, I thank you for your patience. I am not sorry that I brought this man here into this county, and I might say there might be in your mind an idea of why he is here. This case was brought in Pine county and was transferred here by consent of both counsel and the order of the court. And consequently the court, if he charges you on it at all, will say it is of no concern and it cannot be you would not all be fair. I think you men and women have learned something about how hard a man has to fight against a railroad company, if you have learned nothing else. I think you men and women have been very fair and patient in your consideration and I bring you this man, forty-six years of age, in the prime of life, looking ahead with hope, with aspiration, with an opportunity to advance, and by the negligence of this railroad company, every bit of that is wiped out and [fol. 595] the only thing that can compensate him for his pain and suffering and the loss of his profession is a miserable amount of money. Even if he got every dollar he sued for in this case, $60,000.00, it would never compensate him. There is no amount of money that can compensate a man when life's vision is obliterated and I say, "Give him what he has lost," and that is $37,500.00, and it is a just and an honest verdict.

I thank you.

Charge to Jury

Members of the Jury: It is now my duty to charge you as to the law applicable to this case and to give you such instructions as I believe may be helpful and useful to you in the performance of your duties.

You are the exclusive judges of the facts and I have nothing to do with determining those questions of fact. That duty rests upon you and it would not be right that I should in any way indicate to you what my personal opinion may be regarding disputed questions of fact, nor shall I do so. It is my duty to charge you as to the law that you will apply to the facts as you find the facts to be, and it becomes your duty as jurors to accept that law as I give it to you as the law and even though it might not seem to you to be the law as you thought it was or as you thought it ought to be. If I should make an error in that matter it would not be for you to attempt to correct it, but any error [fol. 596] that I might make in that respect could be promptly remedied. So for the purpose of this case, the law as I give it to you is the law of this case and it is your duty to so accept it and to so apply it to the facts as you find the facts to be. I know that you have paid close attention to the charge of the court in all cases where you have acted as jurors and I feel that it is necessary that you pay close attention to the law as I give it to you in this case for the reason that you have acted as jurors in cases involving injury on account of the negligence of others and I have explained that law to you and I have explained to you the law concerning contributory negligence and its effect, and in this case the law is somewhat different, and materially different in some respects, than the law of our state between individuals where actions are brought upon claims of negligence and injury resulting therefrom.

The plaintiff, Noah Moquin, brings this action against the defendant, the Soo Railway Company, for damages which he claims he suffered on account of the negligence of the defendant railway company. He claims that the defendant railway company was negligent and that that negligence was the proximate cause of his injuries. That means the direct and immediate cause of his injuries.

It is admitted by the pleadings in this case that the defendant railway company is a common carrier and that at the time of the accident in question it was engaged in interstate commerce, that is, commerce between two or more of the states of the United States. It is also admitted by the [fol. 597] pleadings that the plaintiff, Mr. Moquin, was employed by the defendant railway company and was then

acting for it as its servant in the carrying on of that interstate commerce, through its railroad. And so, under those conditions, it brings the case within what is known as the Federal Employers' Liability Act, a statute of the United States, an act of Congress, which makes provision for employes to recover damages against a railroad company where they have so suffered injury on account of the negligence of the railway company. And when I say the negligence of the railway company I mean through the negligence of any of its officers, agents, employes or other servants, and I will read you that statute. It reads as follows: "Every common carrier by railroad while engaged in commerce between any of the several states, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injuries resulting, in whole or in part, from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed or other equipment."

The claim of the plaintiff is that while so engaged by defendant railway company on the 27th day of February, 1928, and at the station of Cloverton, in this state, the defendant railway company was guilty of negligence, in that it allowed and permitted a certain house track to be, and that the same was, in a dangerous and unsafe condition for [fol. 598] the movement of cars thereon, in this, that such house track was covered with snow and ice and that because thereof the same was dangerous and unsafe for use in switching railway cars upon such track, and the plaintiff further claims that while he was riding upon a certain car which was being switched and moved on said house track he had no knowledge of the unsafe condition of the track, and that the defendant railway company failed to exercise proper precautions to ascertain whether the track was in a reasonably safe condition for the passage of cars, and the plaintiff also claims that while he was so upon this car which was being moved on this house track, because of the defective condition of the track, the car was caused to be derailed and that he was thrown from the car and received severe personal injury, and he brings this action to recover damages for such injury.

The defendant denies that it is guilty of negligence or carelessness that caused or contributed to cause the plaintiff's injuries, and further, the defendant contends that the injuries plaintiff sustained were due to risks and hazards which he knew and which the plaintiff knowingly and voluntarily assumed. The defendant further claims that the plaintiff's injuries were due solely to his own negligence and that these injuries were directly and proximately contributed to by his own want of care.

There is now in this case only one claim of negligence, [fol. 599] In the complaint other grounds of negligence, or at least one other ground of negligence, were alleged, but no evidence has been introduced with reference to that feature of the case, and the question, the main question, before you is, first whether or not the defendant railway company was negligent in its failure to keep this house track in a safe condition for use by its employes, in that it, as the plaintiff claims, had permitted ice and snow to accumulate upon this track and so rendered it in an unsafe condition, and that the defendant failed to have proper and timely inspection made of the house track in question and that the defendant railway company failed to ascertain whether or not such house track was safe for the passage of cars over that house track.

Evidence has been introduced in this case as to the snowfall and as to the weather and climatic conditions at and about the time of the injuries, and you will remember that evidence, in substance at least, and in that regard I charge you that it is the law of this state that the general rule is that a railway company is not liable to its employes for injuries resulting merely from climatic conditions, such as snow and ice, but within its yard limits it must exercise a degree of care commensurate with the risks to prevent the accumulation of ice and snow in such quantity, form and location as to be a menace to the safety of its employes working in its yard.

Plaintiff claims that snow and ice were permitted to accumulate upon the tracks and that, under the circum- [fol. 600] stances existing at the time and place in question, this snow and ice remained upon the track a sufficient length of time to have enabled the defendant, in the exercise of ordinary and reasonable care, to have discovered the presence of such snow and ice and to have discovered

the fact that it rendered the house track unsafe for the passage of cars over it; and there we find in this case a direct conflict in the evidence, a direct conflict in the testimony of some of the witnesses, and it is for you to determine under those circumstances, from all the evidence in the case, the amount of snow and ice on the house track, and whether it had accumulated and existed thereon for such length of time that the defendant knew, or should have known, of the existence of the snow and ice, should have known that such snow and ice if any existed rendered the track unsafe. And furthermore, it is for you to determine from all the evidence in the case whether or not the section foreman in charge of this section of the railroad received actual notice, that is, knowledge, actual knowledge, whether he was actually informed, that there was ice and snow upon the rails of the house track in question a sufficient length of time before the accident to have enabled the railway company, through its employes, to remove such ice, if you find it existed, prior to the accident. You should determine whether, under all the circumstances, the defendant railway company should have anticipated that an accident might happen from the presence of snow and ice upon the track in question. If, from [fol. 601] all the evidence, you are satisfied that the defendant could not have reasonably anticipated that an accident might happen on that account, then the defendant would not be negligent. However, if from all the circumstances, from all the evidence as you have heard the evidence detailed by the witnesses, it is your opinion that the snow and ice remained on the track a sufficient length of time so that the defendant, by the exercise of ordinary and reasonable care, should and could have known of such condition, if you find that the defendant had actual notice, that is, real knowledge, of such conditions, and had that knowledge a sufficient length of time before the accident to enable it to remove the same, and you further find that, under such circumstances, the defendant should have anticipated that an accident might happen, then the defendant would be guilty of negligence. And if you so find and further find that such negligence was the proximate cause—that is, the direct and immediate cause—of the injury, then on that branch of the case your verdict would

be for the plaintiff. By this last statement I mean the defendant would be liable for the injuries suffered by plaintiff unless plaintiff himself was guilty of assumption of the risk, and I will explain that term later in my charge.

The defendant railway company, in addition to denying that it was negligent, claims that the plaintiff was himself guilty of negligence which was the sole cause of the accident, and if the accident was caused solely and only by the plaintiff's negligence or want of care and was not caused [fol. 602] by negligence on the part of the defendant, then, of course, in such case, the plaintiff could not recover at all; that is, if he were solely at fault and the defendant railway company was not guilty of negligence.

In the answer of the railway company it claims, in addition to other defenses, that the plaintiff was guilty of what is known as contributory negligence that is, that there was lack of care on his part which contributed to his injury and that that lack of care on his part was the proximate cause of his injury, that is, the direct and immediate cause of his own injury.

And so I think it proper that right here I should explain to you what negligence really means. Negligence is the failure of a person to use that degree of care that an ordinarily prudent person would use and exercise under the same or similar circumstances. And contributory negligence amounts to the same thing. Contributory negligence is negligence on the part of a person who has been injured, a failure on his part to use that degree of care that an ordinarily prudent person would use under the same or similar circumstances, which negligence contributed to the injury, which was the direct and immeditae cause of his injury.

In other cases in which you have acted as jurors, I have charged you that if the plaintiff was guilty of contributory negligence, as I have just defined that term to you, then that would — a complete defense, but that is not the law in this case because the federal statutes make a different provision, and the federal statute in that respect reads as [fol. 603] follows: "When action is brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injury to an employe, or where such injuries have resulted in his death, the fact that the employe may have

been guilty of contributory negligence shall not bar a recovery, but in such case the damages shall be diminished by the jury in proportion to amount of negligence attributable to such employe."

Counsel for defendant have submitted to me, before argument of the case, certain requests that I should give to the jury as the law of this case, and under our statute it is my duty to mark opposite each one of these requested instructions the word "given," if given, or "given as modified" or "refused," and counsel in their argument have referred to some of those requests which were marked given and have commented upon them. In this connection and with reference to the statute on contributory negligence, I will read to you at this time one of those requests which I marked as given because it would be my duty to read it to you during my charge and I think this is the proper place to read this particular one.

This action is brought under the Federal Employers' Liability Law. Under that law, if both the employe and the railway company are negligent, under the rules given you, the negligence must be apportioned and each party charged with his or its share, or percentage, of the total negligence. The law provides that the damages recover- [fol. 604] able by an employe shall be diminished in the proportion that the negligence of the employe bears to the combined negligence of both the employer and employe. If you find from the evidence that both the railway company and the plaintiff were partly to blame for this accident, you will first determine the total amount of plaintiff's damages, if any, and then you will deduct therefrom such proportion as is chargeable to the negligence of the plaintiff. For the purpose of illustration only: Suppose you find that the plaintiff suffered damages in a certain amount, but that both the plaintiff and the railway were equally responsible for the injury, you would then give a verdict against the defendant for only one-half of the total damages. If you find that both the plaintiff and the railway were to blame in some other proportion, then you will make the apportionment accordingly.

Of course, if you found that the railway company was guilty of negligence, that that negligence was the proximate cause of the injury and that the defendant railway company was liable, then you would determine the amount of

damages the plaintiff had suffered, and if you found that the plaintiff was not guilty of contributory negligence, then your verdict would be for the total amount of damages which you so found. If, on the other hand, you found that the plaintiff himself was guilty of contributory negligence, then you would make the deduction in the manner I have explained to you, taking the negligence of both the plaintiff and defendant into consideration in that case, putting [fol. 605] them together to find the total negligence of both of them, and then deduct from the verdict the amount which you so found, a proportion of which would be equal to the proportionate part the plaintiff's negligence bore to the total negligence.

The defendant further claims that such injuries as the plaintiff did sustain were due to risks and hazards which plaintiff knowingly and voluntarily assumed and that is a defense which is known in the law as the assumption of risk—risks and hazards which the plaintiff knowingly and voluntarily assumed. The plaintiff in this case contends that his injuries were not caused by any risks or hazards which he knowingly and voluntarily assumed, and the plaintiff denies that he knew of the existence of any risks or hazards, and that is one of the questions of fact for you to determine—whether or not plaintiff's injuries were due to risks and hazards which he knowingly and voluntarily assumed.

Under the law, an employe of a railway company assumes the risks and hazards which are ordinarily and normally present in the work which he is doing, such hazards as are normally and necessarily incident to his occupation being assumed by the servant whether he is actually aware of them or not; and in this connection, you should determine whether the risks and hazards, if any, to which the plaintiff was subject were normally and necessarily incident to his occupation. There are, however, risks of another sort not naturally incident to the occupation, but which may arise out of the failure of the employer to [fol. 606] exercise reasonable care with respect to providing a reasonably safe place in which to work. Such risks as those the employe does not assume until he becomes aware of them, that is, until he knows of such risks, or unless those risks are so obvious, so plain, that an ordi-

narily prudent and careful person, under the circumstances, would have observed and appreciated them.

If you are satisfied by a fair preponderance of the evidence in this case that the injuries to the plaintiff were due to one of the normal and ordinary risks and hazards of his employment, or that he knew, understood and appreciated the same then the plaintiff would be guilty of assumption of risk and he would not be entitled to recover in this case.

I charge you, further, that it is not the duty of an employe to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employe has the right to assume that the employer or his agents have exercised proper care with respect to his safety, until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily prudent person would have observed and appreciated it. An employe does not assume the risk arising from the negligence of a fellow servant unless he becomes aware of such negligent conduct or it is so plainly observable that he may be presumed to have known it. An employe has a right to assume that his employer has [fol. 607] exercised proper care with respect to providing a reasonably safe place of work, and if, on the question of assumption of risk, it does not appear to you, by a fair preponderance of the evidence, that plaintiff's injuries arose from risks which he voluntarily assumed and appreciated, then the plaintiff would not be held guilty of assumption of risk and your verdict on this branch of the case would be in favor of the plaintiff.

I have used the term "by a fair preponderance of the evidence." It is the duty of the plaintiff to establish negligence on the part of the defendant, in the first instance, and by a fair preponderance of the evidence. It is the duty of the defendant railway company to establish contributory negligence, the burden is on the defendant in that case to establish contributory negligence on the part of the plaintiff by that same degree of proof, a fair preponderance of the evidence; and it is necessary that you be satisfied by a fair preponderance of the evidence that the plaintiff assumed the risk, as I have explained that term to you, before you would be justified in finding that he had so assumed the risk—by that same degree of proof, a fair pre-

ponderance of the evidence. That means by evidence that, in your judgment and opinion, weighs more, has greater force and effect upon your minds, your reasoning power, than the evidence on the other side of the case, and wherever a party has the burden of establishing a fact by a fair preponderance of the evidence, before that fact is established there must be greater weight on his side—not a [fol. 608] greater number of witnesses, necessarily, but evidence of more convincing force and effect. If the evidence were equally balanced so that you could not tell, if the scales balanced, as it were, then the party having that burden would not have established the fact by a fair preponderance of the evidence.

During the trial of this case certain rules were offered in evidence and some were received in evidence and read to you. Among those rules was a rule of the railway company known as Rule No. 102. It was offered in evidence, it was received without objection, it was read to you and you will remember that that was the rule with reference to protecting crossings. I shall not attempt to quote it to you, but it was, in effect, that it was the duty of a member of the switching crew to guard the crossing, to precede the cars as they approached a crossing, and to remain at the crossing to guard the crossing until the engine came forward if they were to make a forward movement. It is contended on the part of the defendant railway company that the plaintiff failed to observe that rule and failed to stay at the crossing. In that respect I charge you as follows: Rule known as Rule No. 102, has been introduced in evidence in this case, the rule providing as I have outlined it to you. Under the evidence in this case as it now stands, you are instructed that this rule is not to be considered by you for any purpose and you are to treat and consider this cause as though such rule were not in existence. In my opinion, under all the evidence in the case, the disobedience [fol. 609] of this rule, if it was disobeyed, would not relieve the defendant of liability for negligence on its part, if you find that the defendant was, in fact, guilty of negligence and that such negligence was the proximate cause of the plaintiff's injury. In other words, in determining this case and on the question of whether or not the plaintiff was negligent, you will not take into consideration his violating or not violating Rule 102.

I will now read to you certain requests which were requested by the defendant and which I have marked as given and which so become a part of my charge:

"In this case the court is of opinion that there is not sufficient evidence to warrant a finding of negligence on the part of the locomotive engineer in connection with the accident causing the injuries of the plaintiff, and that ground of negligence is therefore withdrawn from the consideration of the jury." It is true that there is no ground of negligence based upon acts of the engineer.

And again: "In this case the court is of the opinion that there is not sufficient evidence to warrant a finding of negligence on the part of the conductor Rennie, in connection with the accident causing the injuries of the plaintiff, and that ground of negligence is therefore withdrawn from the consideration of the jury."

And again: "The mere fact that the car was derailed and the plaintiff, Moquin, was injured does not make the defendant railway liable for his injuries. The fact that the ac- [fol. 610] cident happened on the railway company's tracks and while its engine and cars were being moved about does not prove nor tend to prove that the railway company was negligent. The fact that Moquin was employed by the railway company and was working for the company on this train and with these cars at the time of the accident does not in itself make the railway company liable for his injuries. You will understand that there is no Workman's Compensation Law covering railroad employes; that is, there is no law providing compensation from the mere fact that an employe was injured while at work for the railway. In cases like this, negligence of the railway must be the ground of recovery; and before plaintiff can recover he must establish by a fair preponderance of all the evidence that the railway company was negligent and that such negligence was the direct and proximate cause of his injuries."

And again: Perhaps, I have stated this in my general charge, but I have marked it as given. "Negligence is never presumed. It must be proved. The burden of proof is upon the plaintiff to establish by a fair preponderance of the evidence that defendant was negligent in one or more of the respects alleged by the plaintiff. If plaintiff has not established by a fair preponderance of the evidence that the defendant was negligent, your verdict must be for the

defendant. If the evidence is evenly balanced, or if you are unable to say on which side is the preponderance of the evidence, then your verdict must be for the defendant." [fol. 611] And that is so, because, as I just explained to you, the burden being upon the plaintiff to establish negligence, he must do so, not by evenly balanced evidence, but by evidence that weighs more, in your judgment and opinion, and has greater force and weight in your mind, in your judgment, than the evidence on the part of the defendant.

"If you find from the evidence that the plaintiff Moquin was chargeable with the duty of seeing that the house track was safe before backing the car which was derailed into the snow on the track, and if you find that the accident and injury resulted solely from his failure to perform such duty and to ascertain that said track was safe before backing the car into the snow; then I charge you as a matter of law that the plaintiff cannot recover in this action and your verdict must be for the defendant."

"The fact that the court gives instructions on the subject of damages, or that counsel have discussed that question, must not be taken by you as an intimation on the part of the court that defendant is liable for the injuries of plaintiff, nor as an admission by the defendant that it is liable for such injuries." And that is true because it is only after you have solved the questions of negligence that you would reach the question of damages.

"Sympathy for the injury or the suffering of plaintiff, if you find that any injury and suffering has been shown, must have no influence upon you in determining whether or not the defendant is liable or is not liable in this case; [fol. 612] nor should any feeling of sympathy control or affect in any way the amount of your verdict, if you find that the plaintiff should recover in any amount. The question of whether or not the defendant is liable is to be determined from the evidence alone, under the instructions of the court, and neither sympathy nor prejudice should in any manner affect your determination of either the liability of the defendant or the amount of your verdict."

"While you are the judges of the credibility of the witnesses, you have no right to disregard or discount the testimony of any witness sworn on behalf of the defendant simply because such witness was or is an employe of the

defendant railway; it is your duty to receive and weigh the testimony of such witnesses in the light of all the evidence, the same as you would the testimony of other witnesses; and it is your duty to determine the credibility of an employe by the same principles and tests by which you determine the credibility of other witnesses." And in that regard, and before I complete my charge, I will give you certain rules which I believe will be helpful and useful to you in determining the credibility of the witnesses and in weighing their testimony.

"The defendant is a railway company, but in fixing the amount of damage, if any, in favor of the plaintiff, you must make no distinction between it and an individual. The law must secure the rights of a railway company exactly as it does your rights and the rights of other persons. It is your duty to treat this defendant here just as fairly as [fol. 613] you would treat anyone else, and you will observe this rule in your deliberations on the questions of liability and in the rendering of your verdict."

I feel and believe that it would assist you in the performance of your duties if, when you retire as jurors you would take up first the question of whether the defendant railway company was negligent, and if you find that the defendant railway company was negligent in maintaining the house track in question, then to determine whether or not that negligence was the proximate cause of the derailment and the resulting injury to the plaintiff. If you find either that the railway company was not negligent or that it was negligent, but that that negligence was not the direct and immediate cause of the injury, then that would end the case, you would have no further duty to perform and in that case your verdict would be for the defendant.

But if you find that the railway company was negligent and that that negligence was the proximate cause of the injury, then you you should take up as the next question the question of whether the plaintiff was himself guilty of assumption of risk, as I have defined that term to you. If you find that the danger was obvious, that he knew of it or that it was so obvious that a reasonably prudent person would have seen and appreciated it, and that nevertheless, he voluntarily assumed that risk, if you so found by a fair preponderance of the evidence, then nothwithstanding the fact that the railway company was guilty of negligence, the

plaintiff could not, under those circumstances, recover, and [fol. 614] your verdict would be for the defendant.

But if you find that the plaintiff did not assume the risk, then the plaintiff would be entitled to recover, assuming that you had first found that the railway company was guilty of negligence and that that was the real cause of the injury.

Mr. Davis: The proximate cause.

The Court: The proximate cause. I used the term real cause when I spoke of proximate cause. You will understand that it means the direct and immediate cause of the injury. If you find that the plaintiff was not guilty of assuming the risk, then it would be your duty to find a verdict for the plaintiff, unless you found that the plaintiff was guilty of contributory negligence, and if you reach that stage of the case, then it would be proper for you to next take up the question of contributory negligence on the part of the plaintiff, as I have explained and defined that term to you.

If you find that the plaintiff was not guilty of contributory negligence, and assuming that you had previously found that the defendant was guilty of negligence which was the proximate cause of the injury, and that the plaintiff had not assumed the risk, then it would be your duty to determine the amount of those damages, the total amount of those damages, and to so return a verdict in favor of the plaintiff.

But if you find that the plaintiff was guilty of contributory negligence, then you would proceed to determine the total amount that would fairly and reasonably compensate [fol. 615] him for his injuries. Then you would determine the amount of the negligence of the defendant railway company. Then you would determine the amount and extent of the contributory negligence of the plaintiff. Then you would combine them, add them together, and determine the total of the negligence on the part of each of them, and then you would deduct from that amount the percentage, the proportion, that the plaintiff's negligence bore to the total, the combined negligence of both parties, and return a verdict in that amount.

And if you reach that point in the case, it will be necessary for you to determine the amount that would be awarded to the plaintiff by way of damages for the injuries

and for the pain and suffering which you find from the evidence he has so suffered and endured. Damages are awarded, not by way of punishment, but merely by way of compensation, to compensate the injured person, as far as money can compensate for a personal injury, to compensate him for the pain and suffering which you find from the evidence he has suffered and endured, and also for such further and future pain and suffering as you may find from all the evidence he shall endure in the future on account of such injury.

There is no fixed rule by which you can measure and determine the amount of money that will so compensate an injured person. In that regard, you must bear in mind the evidence as to the nature and extent of the injury and the suffering he has endured, as you believe it to be from all the [fol. 616] evidence in the case, and with reference to that item and element of damages you would award such amount as, in your best judgment, would fairly and reasonably compensate him for that suffering. In that regard you should be fair and be just both toward the plaintiff and toward the defendant, and not be moved or controlled by any feeling of sympathy or prejudice one way or the other.

If you come to the question of damages it would be proper and necessary for you to next determine the amount which, in your judgment, would fairly and reasonably compensate the plaintiff for his injuries, and in that regard you have a right to, and you should, take into consideration the loss of time and opportunity to follow his vocation or to make a living as a wage earner for himself, and the diminution of his earning capacity on account of these injuries. I do not think it is necessary, nor would it be useful, for me to go in detail into the items or the different injuries which the plaintiff claims that he has sustained. You will remember them. You will remember the testimony of the doctors. There is some conflict between the testimony of the doctors, but the evidence shows, and the defendant's counsel admit, that he received some injuries of at least some severe nature. It is for you, under all the evidence, and using your best judgment, to determine what amount of money, in your judgment and opinion, would reasonably and fairly compensate him for those injuries and for the time he has lost and the opportunity to make a living in the past, since

[fol. 617] those injuries, and how long that situation, in your judgment and opinion, shall exist in the future.

You are the exclusive judges of the facts and you are the exclusive judges of the credibility of the witnesses and it is for you to determine the weight and credit that you will give to the testimony of each witness who has appeared before you and testified, and I will give you again some of the rules I have given you before in other cases to assist you in determining disputed questions of fact.

You have a right to and you should take into consideration the appearance of each witness who has appeared before you and testified, to remember his appearance and conduct on the stand and to remember whether or not that witness, in your opinion, was straightforward and honest and sincere and trying to tell you the truth honestly as he believed and remembered it to be, or whether that witness, in your judgment and opinion, was trying to mislead or deceive you, or to enlarge upon any of the facts in the case. You have a right to and you should take into consideration the source of knowledge any witness may have concerning the facts about which he testifies, whether or not he was in a position to see and know and understand and remember and to accurately relate to you the occurrences concerning which he testified.

You have a right to and you should take into consideration the interest that any witness may have in the result of this lawsuit, any interest either direct or indirect. The fact [fol. 618] that a witness may be interested in the result of a lawsuit does not disqualify a witness, nor should it discredit him, but we all know from our own experience that at times when our personal interests come into view, they may, consciously or unconsciously, influence us to some extent. And so it is right and proper that you should bear that element in mind when you come to weigh the testimony of any witness.

One of the very best rules to be used in determining disputed questions of fact is to consider the reasonableness or the unreasonableness of the testimony any witness may have given, the probability or improbability of its truth, as you see and understand and view it, and in that regard bringing to bear upon that question your own experience in life.

You have a right to, you may if you please, if you believe that any witness has wilfully testified falsely concerning any material fact in the case—I do not mean where he merely contradicted himself or became confused, but if he wilfully, intentionally testified falsely concerning any material fact in the case, then you have a right to, you may if you please, disregard the entire testimony of such witness, except in so far as it may be corroborated—that means upheld, backed up, supported—by other creditable, believable, evidence in the case.

The clerk has prepared two forms of verdict for your use. They are easily understood. In case you find for the plain-[fol. 619] tiff, under the instructions that I have given you, you would use the form that you find for the plaintiff and assess his damages in the sum of blank dollars, inserting in that blank the amount of your verdict. That would be signed by your foreman, dated and returned into court. That is the form of verdict that you would use in case you first found that the defendant railway company was negligent, that its negligence was the proximate cause of the injury, and that the plaintiff was not guilty of assumption of the risk, as I have explained that term to you. In case you found the plaintiff, Mr. Moquin, was guilty of contributory negligence, then the amount you would insert in this verdict would be, not the total amount of the damages that he sustained, but the proportionate part of that amount which was attributable to the railway company. You would deduct the proportionate amount of the plaintiff's negligence from the total amount of damages which you found he had suffered.

In case you find that the railway company was not negligent or in case you find that the railway company was negligent, but that that negligence was not the proximate cause of the injury to plaintiff, or in case you find that the plaintiff assumed the risk, as I have explained that term to you, then you would use the other form of verdict that you find for the defendant, inserting no amount. Whatever verdict you may return will be signed by your foreman and dated. You will select your own foreman. If your verdict is signed by your foreman it will be so signed when you unanimously [fol. 620] agree. If you are not able to agree unanimously, after you have deliberated for twelve hours or more then

any ten or more of your number may unite upon and return a verdict and that would be the verdict of this jury. In such case each concurring juror, that is, each one of the ten or eleven who had agreed, would sign his or her name to the verdict, and there is a space provided on this form of verdict for that purpose, stating "Jurors concurring sign here." If you do not agree unanimously the verdict would be signed by the members agreeing upon the verdict and not by the foreman alone.

There are a number of exhibits that have been introduced in evidence and you may take them with you to your jury room and examine them and they may aid you, in some respects, in determining the facts in this case.

This is an important case. It is important to the plaintiff because, as the plaintiff claims, he has suffered an injury that he claims to be permanent and he seeks to recover damages to compensate him only for such injury. It is important to the railway company because it claims that it was not negligent and because it claims that the plaintiff himself assumed the risk and because it claims that the plaintiff was also guilty of contributory negligence.

I am satisfied that you have given this case your very close attention. It has been ably tried by able counsel and has been ably argued to you by counsel for both the plain-[fol. 621] tiff and the defendant. The duty now rests upon you to determine the truth and if you find that the plaintiff is entitled to recover, then the duty rests upon you to declare by your verdict the amount that he is so entitled to recover. You should be fair toward both parties, not moved by any feeling of sympathy or prejudice one way or the other. Look the facts squarely in the face, do your full duty and return a verdict that meets with the approval of your own conscience and that satisfies you that you have done what was right, under the evidence and the law as given to you by the court, and that you have been just and fair toward both parties. When you have done that you will have done your full duty. In so far as you fail to do that, to that extent, you will have failed to perform your full duty. You are acting in a judicial capacity. You are judges of the facts. You are to declare the truth by your verdict. Have counsel any suggestions?

Mr. Davis: If your Honor please, I think the court charged on damages that they could allow damages for such future pain and suffering as they may find he will suffer. I would ask that that be modified, under the authority of the Ocean case, as follows: The plaintiff, if you find that he is entitled to recover damages, is entitled to recover for such future pain and suffering as you find by a preponderance of the evidence it is reasonably certain he will suffer in the future. I think that is the wording of our Supreme Court.

The Court: Counsel for plaintiff has asked me to modify, [fol. 622] to change, my charge with reference to future pain and suffering and as to the diminution of future earnings on account of these injuries and I will so change the charge and with reference to those two matters you will disregard the language of my charge as originally given and take this as the rule for future pain and suffering: With reference to awarding damages for future pain and suffering, you would be entitled to award the plaintiff in that regard by way of damages for such future pain and suffering as you find, by a preponderance of the evidence, it is reasonably certain he will suffer in the future. And with reference to the diminution in his earning capacity in the future, you will disregard the statement in my charge that I made to you in that respect and you will adopt this rule in that regard: That you may award damages to the plaintiff for diminution in his earning capacity in the future for such diminution in the future as you find, by a preponderance of the evidence, it is reasonably certain he will suffer in the future. Have counsel any other suggestion or request?

Mr. Boyle: No, your Honor. I have some exceptions, but I suppose we can take those after the jury goes out.

The Court: Yes. Mr. Clerk, will you swear officers to take charge of the jury?

Defendant's Exceptions

Thereupon, after the jury had retired, the following proceedings were had:

Mr. Boyle: If your Honor please, the defendant wishes [fol. 623] to take an exception on account of the court's

refusal to give the request for an instruction numbered VI in the requests handed to your Honor.

The defendant also excepts to the court's refusal to give the request numbered VII in the same instrument.

The defendant also takes an exception to the court's refusal to give request No. VIII.

The defendant also takes an exception to the court's refusal to give request No. IX.

The defendant also takes an exception to the court's refusal to give request No. X.

The defendant also takes an exception to the court's refusal to submit to the jury the special questions requested in request No. XIII.

The Court: That is as to the submission of the special questions? The rest was given.

Mr. Boyle: Yes, your Honor, I understood that. The defendant takes an exception to the court's refusal to give the last paragraph or the last lines, last sentence, of request No. XV.

The Court: Yes.

Mr. Boyle: The defendant takes an exception to the court's refusal to give defendant's request No. XVI.

The defendant takes an exception to the charge given by the court with reference to future earnings and to pain and suffering and diminution in earning capacity.

The defendant takes an exception, if your Honor please, to the court's instruction with reference to rule No. 102, [fol. 624] for the reason that the defendant claims that rule No. 102 was properly in the case and that the jury should have been permitted to take that rule into consideration in determining not only the primary duty of the plaintiff, but also in connection with contributory negligence and the question of assumption of risk and in connection with the sole negligence of the defendant.

The Court: That was really covered, was it not, by one of your requests?

Mr. Boyle: I do not believe it was, your Honor. Your Honor's position on rule No. 102 was something that came up after those requests were written.

The Court: Yes, after they were written, but——

Mr. Boyle: And I carried no request on that.

The Court: All right. Oh, it was No. IX I had reference to. That involved that rule.

Mr. Fryberger: The defendant excepts to all that part of the court's charge in which he, in substance, instructed the jury that it was the obligation of the defendant to keep the tracks at Cloverton reasonably free from snow and ice.

Excepts to all that part of the court's charge which instructs the jury that the defendant is liable to the plaintiff in any case where they might allow the snow to remain on the tracks of the railroad at Cloverton, that part of the tracks in question.

The defendant excepts to all that part of the court's charge which, in substance, instructs the jury that defend-
[fol. 625] ant would be liable if it allowed snow to remain on the track for an unreasonable length of time.

The defendant excepts to all that part of the court's charge which, in substance, tells them that it was the duty of the defendant to furnish a reasonably safe place for the plaintiff to work, inasmuch as there is no evidence of any nature or description that the place to work was not safe, and on the further ground that these men, including the plaintiff, were furnished with perfectly safe equipment for the purpose of taking care of the snow and make the track safe for use.

The defendant excepts to all that part of the court's charge which submits to the jury the question of whether or not the plaintiff assumed the risk, on the ground that the evidence is conclusive that he did assume the risk and had charge of the operation and the movement of the train at the time of the accident and during the entire switching movement at Cloverton.

The defendant excepts to all that part of the court's charge which, in substance, refuses to allow the jury to consider the evidence as to the duties of the plaintiff to guard the crossing from the ground, it being the contention of the defendant that that was an element that should be considered by the jury in all phases of the questions of negligence, contributory negligence and assumption of risk.

Adjourned to nine o'clock A. M. of the next day, Saturday, May 25, 1929.

Friday, May 24, 1929—11:25 o'clock P. M.

[fol. 626] At 11:25 o'clock P. M. Friday, May 24, 1929, at the request of the court the jury was returned into court

by the officers in charge of the jury and the following proceedings were had:

FURTHER INSTRUCTION TO JURY

The Court: Mr. Reporter, let your record show that the jury was called into court at 11:25 P. M., that the plaintiff and defendant were both represented by counsel and the following further instruction was given to the jury:

The record shows that you retired at 4:22 o'clock this afternoon for your deliberations. I advised you at that time that in case you were unable to unanimously agree, after having deliberated twelve hours or more, then any ten or eleven of your number could unite upon a verdict, and in that case each one of the jurors so concurring upon the verdict would sign the verdict and date it and it would be returned into court.

Court will not be open to receive your verdict any later this evening and if you should agree upon a unanimous verdict within twelve hours, then it would be signed by your foreman and in that case it would be dated and delivered to your foreman and he should enclose it and seal it in an envelope and retain it and you could then separate. In that case your verdict would be returned into court when court opens at nine o'clock tomorrow morning, but in such event you should not disclose to anyone the contents of that verdict, but keep it secret until it is opened in court.

If you are not able to come to a unanimous agreement, after having deliberated more than twelve hours, any ten [fol. 627] or more of your number could unite upon a verdict. If you do so arrive at a verdict it will be signed by each one of the concurring jurors, dated, and the hour and the minute when you arrive upon that verdict will be endorsed upon the verdict. In that case you may deliver the verdict to your foreman and he will seal it in an envelope and you will then separate and you will all return here tomorrow morning at nine o'clock when your verdict will be opened and read by the clerk. I suggest that in case of a verdict by ten or eleven jurors that you do not agree upon that verdict and deliver it to your foreman until more than twelve hours have elapsed—not at 4:22 A. M., but some few minutes, at least, after that time, so that

there can be no mistake or dispute as to your having deliberated more than twelve hours.

You may now retire with the officers.

DEFENDANT'S REQUESTED INSTRUCTIONS GIVEN

The following requests to charge were made on behalf of the defendant and marked "given" by the court:

I

In this case the court is of the opinion that there is not sufficient evidence to warrant a finding of negligence on the part of the locomotive engineer in connection with the accident causing the injuries of the plaintiff, and that ground of negligence is therefore withdrawn from the consideration of the jury.

II

In this case the court is of the opinion that there is not [fol. 628] sufficient evidence to warrant a finding of negligence on the part of the conductor, Rennie, in connection with the accident causing the injuries of the plaintiff, and that ground of negligence is therefore withdrawn from the consideration of the jury.

III

The mere fact that the car was derailed and the plaintiff Moquin was injured does not make the defendant railway liable for his injuries. The fact that the accident happened on the railway company's tracks and while its engine and cars were being moved about does not prove nor tend to prove that the railway company was negligent. The fact that Moquin was employed by the railway company and was working for the company on this train and with these cars at the time of the accident does not in itself make the railway company liable for his injuries. You will understand that there is no Workmen's Compensation Law covering railroad employes; that is, there is no law providing compensation from the mere fact that an employe was injured while at work for the railway. In cases

like this, negligence of the railway must be the ground of recovery, and before plaintiff can recover he must establish by a fair preponderance of all the evidence that the railway company was negligent and that such negligence was the direct and proximate cause of his injuries.

IV

Negligence is never presumed. It must be proved. The burden of proof is upon the plaintiff to establish by a fair [fol. 629] preponderance of the evidence that defendant was negligent in one or more of the respects alleged by the plaintiff. If plaintiff has not established by a fair preponderance of the evidence that the defendant was negligent, your verdict must be for the defendant. If the evidence is evenly balanced, or if you are unable to say on which side is the preponderance of the evidence, then your verdict must be for the defendant.

V

If you find from the evidence that the plaintiff Moquin was chargeable with the duty of seeing that the house track was safe before backing the car which was finally derailed into the snow on the track, and if you find that the accident and injury resulted solely from his failure to perform such duty and to ascertain that said track was safe before backing the car into the snow; then I charge you as a matter of law that the plaintiff cannot recover in this action and your verdict must be for the defendant.

XI

The fact that the court gives instructions on the subject of damages, or that counsel have discussed that question, must not be taken by you as an intimation on the part of the court that defendant is liable for the injuries of plaintiff, nor as an admission by the defendant that it is liable for such injuries.

XII

Sympathy for the injury or the suffering of plaintiff, if you find that any injury and suffering has been shown, must [fol. 630] have no influence upon you in determining whether or not the defendant is liable or is not liable in this case; nor should any feeling of sympathy control or affect

in any way the amount of your verdict if you find that the plaintiff should recover in any amount. The question of whether or not the defendant is liable is to be determined from the evidence alone, under the instructions of the court, and neither sympathy nor prejudice should in any manner affect your determination of either the liability of the defendant or the amount of your verdict.

XIV.

While you are the judges of the credibility of the witnesses, you have no right to disregard or discount the testimony of any witness sworn on behalf of the defendant simply because such witness was or is an employe of the defendant railway; it is your duty to receive and weigh the testimony of such witnesses in the light of all the evidence, the same as you would the testimony of other witnesses; and it is your duty to determine the credibility of an employe by the same principles and tests by which you determine the credibility of other witnesses.

The following request to charge was made on behalf of the defendant and marked "Given except as to submitting specific questions" by the court, the portion of said request not given by the court being in parentheses:

XIII

This action is brought under the Federal Employers' [fol. 631] Liability Law. Under that law, if both the employe and the railway company are negligent, under the rules given you, the negligence must be apportioned and each party charged with his or its share, or percentage, of the total negligence. The law provides that the damages recoverable by an employe shall be diminished in the proportion that the negligence of the employe bears to the combined negligence of both the employer and employe. If you find from the evidence that both the railway company and the plaintiff were partly to blame for this accident, you will first determine the total amount of plaintiff's damages, if any, and then you will deduct therefrom such proportion as is chargeable to the negligence of the plaintiff. For the purpose of illustration only: Suppose you find that the plaintiff suffered damages in a certain amount, but that both the plaintiff and the railway were equally responsible for the injury, you would then give a verdict

against the defendant for only one-half of the total damages. If you find that both the plaintiff and the railway were to blame in some other proportion, then you will make the apportionment accordingly.

(In this connection, the court will submit to you the following questions:

Question 1. What do you find to be the whole amount of plaintiff's damages?

Answer. — Dollars.

Question 2. What percentage of the total negligence do you find chargeable to the plaintiff himself?

[fol. 632] Answer. — per cent.

Question 3. What percentage of the total negligence do you find chargeable to the defendant railway company?

Answer. — per cent.)

The following request to charge was made on behalf of the defendant and marked, "Given to last paragraph," by the court, the portion of said request not given by the court being in parentheses:

XV

The defendant is a railway company, but in fixing the amount of damage, if any, in favor of the plaintiff, you must make no distinction between it and an individual. The law must secure the rights of a railway company exactly as it does your rights and the rights of other persons. It is your duty to treat this defendant here just as fairly as you would treat anyone else, and you will observe this rule in your deliberations on the questions of liability and in the rendering of your verdict.

(Your should follow the same rule in fixing the damages, if you find that the plaintiff is entitled to damages, that you would follow in fixing damages in a case between any other persons.)

Defendant's Requested Instructions Refused

The following requests to charge were made on behalf of the defendant and marked "Refused" by the court:

VI

If you find from the evidence that the plaintiff Moquin and the other brakeman, Carr, were equal in rank and

authority with respect to the operation of flanging out the house track at the time and place in question and that both [fol. 633] Moquin and Carr were equally chargeable with the duty of seeing that the track was safe before backing the car which was finally de-railed into the snow on the house track; and if you find that the accident and injury to the plaintiff resulted solely from the failure of both of these men to perform such duty and to ascertain that such track was safe before backing the car into the snow; then I charge you as a matter of law that the plaintiff cannot recover in this action and your verdict must be for defendant.

VII

The plaintiff, in engaging in the employment of a brakeman on a railroad, assumed the risks arising from dangers ordinarily and naturally incident to that employment; and he also assumed the risks arising from dangers created by the master's negligence, provided he knew, or in the exercise of ordinary care should have known of such dangers, and appreciated the risks arising therefrom. In this connection, you are instructed that an employe is bound to inform himself by all reasonable means concerning the perils of his employment; he must exercise his intelligence; and when a situation suggests investigation and inspection in order that its dangers may be fully disclosed he is under the obligation of investigation and inspection. The employe is bound to see and understand all dangers that a prudent and intelligent person of the same age and experience would see and understand. And in this case, even [fol. 634] though you find that the house track was unsafe by reason of snow, or ice, or both, being thereon, the plaintiff assumed the risk of moving the car thereon, if the situation was such as to suggest investigation of the condition and he failed to make such investigation. In this connection, you will take into consideration that the work at several stations during the day had been the flanging out of tracks; that it was winter time when there was snow on the ground, and that the plaintiff himself considered it necessary to flange out the house track. If you find that the situation here was such as to suggest to the plaintiff that there might be danger of derailment of the car, and without investigation as to the safety of the track, he

caused, or participated in causing, the car to be pushed over the track, and took a position on the top of the car while it was being so moved, then I charge you as a matter of law that he assumed the risks of the situation and of what was being done, and he cannot recover in this action and your verdict must be for the defendant.

VIII

Some evidence has been introduced tending to prove that a safe method of doing the work would have been to proceed forward with the engine on the house track. There has also been introduced evidence tending to prove that it was unnecessary for plaintiff to be upon the car as it was being backed on the house track, and that it was his duty to remain on the ground at the intersection of the public street with the railway tracks. In this connection, I charge you [fol. 635] that it was the duty of the plaintiff to do his work with due regard to his own safety; and if you find from the evidence that he voluntarily chose an unsafe and dangerous method of doing his work, when there was a safe method open to him, then he cannot recover in this action, and your verdict must be for the defendant.

IX

If you find from the evidence that it was the duty of the plaintiff to remain on the ground and protect traffic over the crossing at the intersection of the public highway with the railway tracks, as the cars were being backed over said highway, and to remain at said intersection for the purpose of protecting traffic as the engine and cars, traveling in a westerly direction, again passed over said highway; then I charge you as a matter of law that the plaintiff cannot recover in this case and your verdict must be for the defendant.

X

If you find from all the evidence in the case under the instructions of the court that the defendant was not negligent, or that if negligent the plaintiff assumed the risk attendant upon the movement of the cars which resulted in his injuries, or if you find that the injuries were caused by the negligence of plaintiff himself, then you have no

right to compromise the question of defendant's liability and give the plaintiff a verdict for some amount merely because he was injured by falling from the car on the occasion in question. If you find from the evidence that [fol. 636] the plaintiff is not entitled to recover, then you will have no occasion to, and you should not, consider the question of damages at all.

XVI

The undisputed evidence in this case is that the car from which the plaintiff Moquin fell was derailed some distance to the south of the Golmo warehouse crossing shown on Defendant's Exhibit "12," and if you find from the evidence that this was the only crossing which, during the winter of 1928 and prior to the date of the accident, was used by the different people in crossing the house track; then I charge you as a matter of law that the plaintiff cannot recover in this action and your verdict must be for the defendant.

Offer in Evidence

The following rules of the defendant railway company were offered in evidence by the plaintiff and received in evidence:

"Responsibility of Conductors and Engineers

107. Both conductors and engineers are responsible for the safety of their trains and, under conditions not provided for by the rules, must take every precaution for their protection."

"Safe Course

108. In all cases of doubt or uncertainty the safe course must be taken and no risks run."

"Responsibility

1151. Section foremen have charge of repairs on their respective sections and shall be held responsible for the conditions of the track and the watching necessary to secure its safety at all times."

[fol. 637] "Go Over Section

1152. Every section foreman is required to go or send a man to inspect his section of road each day, unless otherwise ordered by road master.

He must observe particularly the condition of the roadbed, main track, sidings, bridges, culverts, fences, road crossings, water courses, telephone and telegraph lines, etc., and must make such repairs as are necessary."

The following rule of the defendant railway company was offered in evidence by the defendant and received in evidence:

"102. Movement Over Highway Crossings

In the movement of engines with or without cars switching over highway grade crossings within yard limits, commercial and station sidings, mine, industrial, or passng sidings; unless there is a crossing watchman at his post, or the gates are down, a member of the train or engine crew will protect highway traffic at crossings by preceding each movement over the crossings and see that all highway traffic has been stopped before signalling the engineman to proceed."

Defendant's Exhibit "3."

Mpolis., Feby. 27th.

BG 1258 A. M.
Condr. No. 51.

Do a good job of flanging today and advise what tracks you flange out. Finish the flanging on No. 50 Tuesday.

J. E. M.

[fol. 638] In District Court of Crow Wing County

Verdict of the Jury

We, the jury empaneled and sworn in the above entitled action, find for the plaintiff and assess his damages in the sum of twenty-seven thousand and five hundred dollars.

Dated at Brainerd, Minn., this 25th day of May, A. D. 1929.

C. M. Taylor, Foreman.

Jury retired at 4:22 o'clock P. M. Verdict rendered 9 o'clock A. M. Filed in open court the 25th day of May, 1929. W. A. M. Johnston, clerk.

IN DISTRICT COURT OF CROW WING COUNTY

STIPULATION FOR SETTLING CASE

It is hereby stipulated that the foregoing proposed case, consisting of 648 pages of typewritten matter, may be taken as conformable to the truth and as containing all the evidence offered or received on the trial of this cause, and also the charge in full, the argument of plaintiff's counsel to the jury and all objections, rulings, orders and all other proceedings of such trial, except that those of the exhibits which consist of plats, X-rays and photographs are not included herein, and that the same, together with said exhibits, may be settled and allowed as the settled case herein by the Honorable Graham M. Torrance, without notice. By entering into this stipulation, counsel for plaintiff do not [fol. 639] concede that Mr. Davis' closing argument is properly a part of the record or settled case.

Dated September 4th, 1929.

Davis, Michel & Yaeger, Attorneys for Plaintiff.
Fryberger, Fulton & Boyle, John E. Palmer, Attorneys for Defendant.

IN DISTRICT COURT OF CROW WING COUNTY

ORDER SETTLING CASE

Pursuant to the stipulation by the attorneys for the respective parties herein, I hereby certify that the foregoing case, consisting of 648 pages of typewritten matter, is conformable to the truth and contains all the evidence offered or introduced on the trial of this case, and also the charge in full, the argument of plaintiff's counsel to the jury, and all objections, rulings, orders and all other proceedings of this trial, except that those of the exhibits which consist of plats, X-rays and photographs are not included herein, and

I hereby settle and allow the same, together with said exhibits, as the settled case herein.

Dated September 9th, 1929.

Graham M. Torrance, District Judge.

[fol. 640] In District Court of Crow Wing County

Notice of Motion for Settled Case and for Judgment Notwithstanding Verdict or New Ttial

To the above-named plaintiff and Messrs. Davis, Michel & Yaeger, his attorneys:

You will please take notice:

That, at the court house in the city of Bemidji, county of Beltrami, state of Minnesota, on Monday, the 9th day of September, 1929, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, defendant will move the court, the Hon. Graham M. Torrance, judge thereof, to settle and allow the proposed settled case herewith served upon you, as a settled case in said action; and that, at said time and place, immediately upon the settling of said case, defendant will move said court, upon said settled case and upon all the files, records and proceedings in said action, that judgment be ordered and entered herein in favor of defendant, notwithstanding the verdict of the jury in favor of plaintiff.

Said motion for judgment notwithstanding the verdict will be based upon each and all of the following grounds:

I

That defendant, at the close of all the testimony was entitled to a directed verdict in its favor as moved for by defendant at said time, said motion being based upon each and all of the grounds then and there specified, to-wit:

1. That the evidence addnced in behalf of plaintiff, taken [fol. 641] in connection with all of the evidence in the case, is not sufficient to warrant a finding by the jury that defendant was guilty of any act of negligence proximately causing, or proximately contributing to, plaintiff's injury.

2. That none of the charges of negligence on the part of defendant set forth in the complaint has been established by substantial evidence, as is required in actions under the Federal Employers' Liability Law.

3. That the evidence shows that plaintiff's injuries were caused by his own acts in moving or participating in moving, the car over the house track without ascertaining that such track was safe and in taking a position on the top of the car while it was being so moved and that such injuries were, therefore, caused solely by plaintiff's own negligence.

4. That the evidence shows that plaintiff's injuries, if not caused solely by his own negligence, were caused by the joint negligence of himself and a joint employe of the same rank and authority in moving the car over the house track without ascertaining that said track was safe for such movement.

5. That the evidence shows that plaintiff knew, or in the exercise of his duty ought to have known, of the condition of the track in question and that plaintiff assumed the risks of such danger as attended the condition of the track and the movement of the car from which he fell and sustained the injuries complained of.

[fol. 642] 6. That the evidence shows that the primary duty of plaintiff required him to remain on the ground and protect traffic over the crossing at the intersection of the public highway referred to in the evidence as the main street crossing with the railway tracks as the cars were being backed over said highway, and to remain at such intersection for the purpose of protecting traffic as to the engine and cars traveling in a westerly direction again passed over said highway.

II

That the court erred in denying defendant's motion for a directed verdict at the close of all the testimony in said action and in holding that defendant was not entitled to a directed verdict upon any, as well as all, of the grounds then and there specified and which grounds are set forth in the last preceding paragraph of this notice.

III

That the evidence does not justify any verdict in favor of plaintiff but conclusively shows that the verdict should have been in favor of defendant.

You will further take notice, that at said time and place and as part of its said motion, defendant will move the said court that, if said motion for judgment notwithstanding the verdict be denied, the court then make its order setting aside the verdict of the jury and granting defendant a new trial thereof; which said motion for a new trial will be based upon each and all of the following grounds, to-wit:

[fol. 643]

I

That said verdict is not justified by the evidence and is contrary to law.

II

The court erred in authorizing the jury to allow recovery for negligence of defendant in permitting the house track in question to be in an unsafe condition for switching cars by reason of ice and snow thereon; the evidence conclusively showing that the movement in which plaintiff was participating at the time of his injury was a flanging movement for the express purpose of removing ice and snow from said track and making the same safe.

III

The court erred in authorizing the jury to allow recovery for negligence of defendant in failing to inspect the house track in question and to ascertain whether there was ice and snow thereon; the evidence conclusively showing that the removal of ice and snow from said track was the work being done at the time of plaintiff's injury.

IV

The court erred in authorizing the jury to allow recovery under the law of Minnesota, instead of the rules of the common law as interpreted and applied by the Federal Courts.

V

The court erred in authorizing the jury to find that plaintiff did not assume the risks arising from ice and snow on

the house track in question and was under no duty to ascertain whether such track was safe and might assume that it was.

[fol. 644]

VI

Errors of law occurring at the trial of said action and duly excepted to at the time and noted and preserved in the record and settled case herein.

VII

Errors of law occurring at the trial of said action and hereby specifically assigned as follows, to-wit:

1. The court erred in instructing the jury as follows:

"The claim of the plaintiff is that while so engaged by defendant railway company on the 27th day of February, 1928, and at the station of Cloverton, in this state, the defendant railway company was guilty of negligence, in that it allowed and permitted a certain house track to be, and that the same was, in a dangerous and unsafe condition for the movement of cars thereon, in this, that such house track was covered with snow and ice and that because thereof the same was dangerous and unsafe for use in switching railway cars upon such track, and the plaintiff further claims that while he was riding upon a certain car which was being switched and moved on said house track he had no knowledge of the unsafe condition of the track, and that the defendant railway company failed to exercise proper precautions to ascertain whether the track was in a reasonably safe condition for the passage of cars, and the plaintiff also claims that while he was so upon this car which was being moved on this house track, because of the defective condition of the track, the car was caused to be de-
[fol. 645] railed and that he was thrown from the car and received severe personal injury, and he brings this action to recover damages for such injury."

2. The court erred in instructing the jury as follows:

"There is now in this case only one claim of negligence. In the complaint other grounds of negligence, or at least one other ground of negligence, were alleged, but no evidence has been introduced with reference to that feature of

the case, and the question, the main question, before you is, first, whether or not the defendant railway company was negligent in its failure to keep this house track in a safe condition for use by its employes, in that it, as the plaintiff claims, had permitted ice and snow to accumulate upon this track and so rendered it in an unsafe condition, and that the defendant failed to have proper and timely inspection made of the house track in question and that the defendant railway company failed to ascertain whether or not such house track was safe for the passage of cars over that house track."

3. The court erred in instructing the jury as follows:

"Evidence has been introduced in this case as to the snowfall and as to the weather and climatic conditions at and about the time of the injuries, and you will remember that evidence, in substance, at least, and in that regard I charge you that it is the law of this state that the general rule is that a railway company is not liable to its employes for injuries resulting merely from climatic conditions, such [fol. 646] as snow and ice, but within its yard limits it must exercise a degree of care commensurate with the risks to prevent the accumulation of ice and snow in such quantity, form and location as to be a menace to the safety of its employes working in its yards."

4. The court erred in instructing the jury as follows:

"Plaintiff claims that snow and ice were permitted to accumulate upon the tracks and that, under the circumstances existing at the time and place in question, this snow and ice remained upon the track a sufficient length of time to have enabled defendant in the exercise of ordinary and reasonable care, to have discovered the presence of such snow and ice and to have discovered the fact that it rendered the house track unsafe for the passage of cars over it; and there we find in this case a direct conflict in the evidence, a direct conflict in the testimony of some of the witnesses, and it is for you to determine under those circumstances, from all the evidence in the case, the amount of snow and ice on the house track, and whether it had accumulated and existed thereon for such length of time that

the defendant knew, or should have known of the existence of the snow and ice, should have known that such snow and ice, if any existed, rendered the track unsafe."

5. The court erred in instructing the jury as follows:

"You should determine whether, under all the circumstances, the defendant railway company should have antici- [fol. 647] pated that an accident might happen from the presence of snow and ice upon the track in question. If, from all the evidence, you are satisfied that the defendant could not have reasonably anticipated that an accident might happen on that account, then the defendant would not be negligent. However, if from all the circumstances, from all the evidence as you have heard the evidence detailed by the witnesses, it is your opinion that the snow and ice remained on the track a sufficient length of time so that the defendant, by the exercise of ordinary and reasonable care, should and could have known of such condition, if you find that the defendant had actual notice, that is, real knowledge, of such conditions, and had that knowledge a sufficient length of time before the accident to enable it to remove the same, and you further find that, under such circumstances, the defendant should have anticipated that an accident might happen, then the defendant would be guilty of negligence."

6. The court erred in instructing the jury as follows:

"Under the law, an employe of a railway company assumes the risks and hazards which are ordinarily and normally present in the work which he is doing, such hazards as are normally *present in the work which he is doing, such hazards as are normally* and necessarily incident to his occupation being assumed by the servant whether he is actually aware of them or not; and in this connection, you should determine whether the risks and [fol. 648] hazards, if any, to which the plaintiff was subject were normally and necessarily incident to his occupation. There are, however, risks of another sort not naturally incident to the occupation, but which may arise out of the failure of the employer to exercise reasonable care with respect to providing a reasonably safe place in which to

work. Such risks as those the employe does not assume until he becomes aware of them, that is, until he knows of such risks, or unless those risks are so obvious, so plain, that an ordinarily prudent and careful person, under the circumstances, would have observed and appreciated them."

7. The court erred in instructing the jury as follows:

"I charge you, further, that it is not the duty of an employe to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employe has the right to assume that the employer or his agents have exercised proper care with respect to his safety, until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily prudent person would have observed and appreciated it. An employe does not assume the risk arising from the negligence of a fellow servant unless he becomes aware of such negligent conduct or it is so plainly observable that he may be presumed to have known it. An employe has a right to assume that his employer has exercised proper care with respect to providing a reasonably [fol. 649] safe place of work, and if, on the question of assumption of risk, it does not appear to you, by a fair preponderance of the evidence, that plaintiff's injustice arose from risks which he voluntarily assumed and appreciated, then the plaintiff would not be held guilty of assumption of risk and your verdict on this branch of the case would be in favor of the plaintiff."

8. The court erred in instructing the jury as follows:

"During the trial of this case certain rules were offered in evidence and some were received in evidence and read to you. Among these rules was a rule of the railway company known as Rule No. 102. It was offered in evidence, it was received without objection, it was read to you and you will remember that that was the rule with reference to protecting crossings. I shall not attempt to quote it to you, but it was, in effect, that it was the duty of a member of the switching crew to guard the crossing, to precede the cars as they approached a crossing, and to remain at the

crossing to guard the crossing until the engine came forward if they were to make a forward movement. It is contended on the part of the defendant railway company that the plaintiff failed to observe that rule and failed to stay at the crossing. In that respect I charge you as follows: Rule known as Rule No. 102 has been introduced in evidence in this case, the rule providing as I have outlined it to you. Under the evidence in this case as it now stands, you are instructed that this rule is not to be considered by [fol. 650] you for any purpose and you are to treat and consider this case as though such rule were not in existence. In my opinion, under all the evidence in the case, the disobedience of this rule, if it was disobeyed, would not relieve the defendant of liability for negligence on its part, if you find that the defendant was, in fact, guilty of negligence and that such negligence was the proximate cause of the plaintiff's injury. In other words, in determining this case and on the question of whether or not the plaintiff was negligent, you will not take into consideration his violating or not violating Rule 102."

9. The court erred in refusing to instruct the jury as follows, as requested by defendant in its Requested Instruction No. VI:

"If you find from the evidence that the plaintiff Moquin and the other brakeman, Carr, were equal in rank and authority with respect to the operation of flanging out the house track at the time and place in question and that both Moquin and Carr were equally chargeable with the duty of seeing that the track was safe before backing the car which was finally derailed into the snow on the house track; and if you find that the accident and injury to the plaintiff resulted solely from the failure of both of these men to perform such duty and to ascertain that such track was safe before backing the car into the snow; then I charge you as a matter of law that the plaintiff cannot recover in this action and your verdict must be for the defendant."

[fol. 651] 10. The court erred in refusing to instruct the jury as follows, as requested by defendant in its Requested Instruction No. VII:

"The plaintiff, in engaging in the employment of a brakeman on a railroad, assumed the risks arising from dangers

ordinarily and naturally incident to that employment; and he also assumed the risks arising from dangers created by the master's negligence, provided he knew, or in the exercise of ordinary care should have known, of such dangers, and appreciated the risks arising therefrom. In this connection, you are instructed that an employe is bound to inform himself by all reasonable means concerning the perils of his employment; he must exercise his intelligence; and when a situation suggests investigation and inspection in order that its dangers may be fully disclosed he is under the obligation of investigation and inspection. The employe is bound to see and understand all dangers that a prudent and intelligent person of the same age and experience would see and understand. And in this case, even though you find that the house track was unsafe by reason of snow, or ice, or both, being thereon, the plaintiff assumed the risk of moving the car thereon, if the situation was such as to suggest investigation of the condition and he failed to make such investigation. In this connection, you will take into consideration that the work at several stations during the day had been the flanging out of tracks; that it was winter time when there was snow on the ground, and that the plaintiff himself considered it necessary to [fol. 652] flange out the house track. If you find that the situation here was such as to suggest to the plaintiff that there might be danger of derailment of the car, and without investigation as to the safety of the track, he caused, or participated in causing, the car to be pushed over the track, and took a position on the top of the car while it was being so moved, then I charge you as a matter of law that he assumed the risks of the situation and of what was being done, and he cannot recover in this action and your verdict must be for the defendant."

11. The court erred in refusing to instruct the jury as follows, as requested by defendant in its Requested Instruction No. VIII:

"Some evidence has been introduced tending to prove that a safe method of doing the work would have been to proceed forward with the engine on the house track. There has also been introduced evidence tending to prove that it was unnecessary for plaintiff to be upon the car as it was being backed on the house track, and that it was his duty to

remain on the ground at the intersection of the public street with the railway tracks. In this connection, I charge you that it was the duty of the plaintiff to do his work with due regard to his own safety; and if you find from the evidence that he voluntarily chose an unsafe and dangerous method of doing his work, when there was a safe method open to him, then he cannot recover in this action, and your verdict must be for the defendant."

[fol. 653] 12. The court erred in refusing to instruct the jury as follows, as requested by defendant in its Requested Instruction No. IX:

"If you find from the evidence that it was the duty of the plaintiff to remain on the ground and protect traffic over the crossing at the intersection of the public highway with the railway tracks, as the cars were being backed over said highway, and to remain at said intersection for the purpose of protecting traffic as the engine and cars, traveling in a westerly direction, again passed over said highway; then I charge you as a matter of law that the plaintiff cannot recover in this case and your verdict must be for the defendant."

13. The court erred in refusing to instruct the jury as follows, as requested by the defendant in its Requested Instruction No. X:

"If you find from all the evidence in the case under the instructions of the court that the defendant was not negligent, or that if negligent the plaintiff assumed the risk attendant upon the movement of the cars which resulted in his injuries, or if you find that the injuries were caused by the negligence of plaintiff himself, then you have no right to compromise the question of defendant's liability and give the plaintiff a verdict for some amount merely because he was injured by falling from the car on the occasion in question. If you find from the evidence that the plaintiff is not entitled to recover, then you will have no occasion to, and you should not, consider the question of damages at all."

[fol. 654] 14. The court erred in refusing to instruct the jury as follows, as requested by the defendant in its Requested Instruction No. XVI:

"The undisputed evidence in this case is that the car from which the plaintiff Moquin fell was derailed some distance to the south of the Golmo warehouse crossing shown on Defendant's Exhibit '12,' and if you find from the evidence that this was the only crossing which, during the winter of 1928 and prior to the date of the accident, was used by the different people in crossing the house track; then I charge you as a matter of law that the plaintiff cannot recover in this action and your verdict must be for the defendant."

VIII

Defendant was deprived of a fair trial on account of misconduct of plaintiff by and through his counsel in making the following statements in the presence of the jury; and in the court's permitting the following proceedings, to-wit:

"Mr. Davis: If it please the court, at this time the plaintiff asks leave of the court to re-open plaintiff's case for one purpose, namely, to introduce evidence which possibly or probably might be in rebuttal, but in an abundance of caution and to protect the plaintiff's rights, we make the motion at this time. I would like to have the record show, your Honor, that on Tuesday evening before or just as court adjourned, counsel for plaintiff notified counsel for the defendant and called to the attention of the court the fact that three witnesses had just been obtained on the [fol. 655] afternoon of Tuesday who would testify as to the condition of the tracks at Cloverton. At the same time counsel for plaintiff stated that a witness by the name of Jones had agreed to be here. I would like to have the record show, for the information of the court, that a week ago Monday Mr. Jones was phoned——

Mr. Fryberger: I do not think, may it please the court, that this statement should be made in open court, anything about Mr. Jones or anything of the kind.

Mr. Davis: Well, I might——.

Mr. Fryberger: If the witness is here and he makes his motion I suppose the court will pass on it. We certainly object to statements.

Mr. Davis: Well, I wanted to state the reason so the court would know what diligence we had used and why we didn't have these witnesses before. I might state this, I

think counsel will not object to it, that Mr. Jones had agreed to be here as a witness, but did not come, and that yesterday morning Mr. Lush, who was in our employ as an investigator, drove to Cloverton and there interrogated two or three of the farmers living there and learned from them that they knew of the condition of the track and had been present shortly after the derailment, and also one of them, I think, present at the derailment, and they are now present in court, and I would like the record also to show that last evening we offered to give to Mr. Fryberger, counsel for the defendant, the names of the witnesses and their addresses. I would ask the court, in the interests of justice [fol. 656] and in order to present to the jury all the facts which are available, to permit us to re-open for that one purpose.

Mr. Fryberger: May it please the court——

Mr. Davis: I might also—just a moment, Mr. Fryberger—I might state to the court that there is also another reason why I think the court should exercise its judgment and its discretion in this matter and that is because of the document I handed the court, which would not lead us to believe that it would be seriously contested that ice was on the track.

Mr. Fryberger: Now, I wish to object to the granting of this motion on the ground that there has no showing been made to justify the court in exercising discretion. The statute provides that the plaintiff shall put in his case and when he has rested then the defendant shall put in his case and then the plaintiff may rebut any new evidence that comes in on the answer. Now, if this can be done in this way there is no reason why the trial should not be reversed any time, anywhere, no showing made of any kind, and we object to it on the ground that it is a matter that the court really has no discretion in.

The Court: The motion is granted, and that being evidence which should properly, in the orderly course of the trial, have been introduced before the plaintiff rested, if counsel for defendant are surprised in any manner and need additional time to rebut any such evidence, such time will be granted. The plaintiff specifically referred to this point of ice on the track and I take it that the defendant, de- [fol. 657] fendant's counsel, anticipated they would have

to meet that issue. If these witnesses had testified on Tuesday on the case in chief, counsel would have had more time to combat or dispute their evidence than they now have, so that in granting this motion it is with the understanding that if counsel for the defendant want the same amount of time to rebut that evidence that they would have had, had it been introduced Tuesday, they may have it.

Mr. Fryberger: We take an exception, your Honor."

IX

The court erred in permitting the plaintiff to reopen his case in the manner set forth in the preceding paragraph of this notice, and call James L. Brewer, Charles L. Halsted and Stephen J. Burden, as witnesses for the plaintiff to give testimony regarding the condition of defendants' track at or near the place of derailment of the car from which the plaintiff was thrown at the time he sustained the injury involved herein, such testimony being offered by the plaintiff and being received by the court after the defendant had introduced all of its testimony regarding the condition of said track at the time and place of said derailment.

X

Defendant was deprived of a fair trial and subjected to an excessive award of damages by reason of misconduct on the part of plaintiff by and through his counsel in making [fol. 658] the following statements in the course of his argument to the jury, to-wit:

1. "I have often wondered in the years I have tried cases for these poor devils who are injured, and for their widows and orphans, who have to fight for their rights against these railroads, I have often wondered if the time would ever come when an injured man could come into a court of justice without having a railroad company try to fasten upon him that he was a perjurer and a liar. I wonder if it is true that the only time men can tell the truth is when they draw their pay checks from the railroad company. These men know where their pay checks come from, from the Soo Railroad, and I say it discounts their testimony, the same as it discounts anybody else's testimony.

2. "Oh, let us see how the railroad prepared to meet that. Why, they brought in Mr. Johnson, their district road-

master, from Minneapolis. Don't you remember, Mr. Boyle, when I asked his name, spelled it out, I presume because there are some of you on the jury who may be Scandinavians. He said, 'J-o-h-n-s-o-n.' That is the way we spell Johnson. I know, because I married a very beautiful Norwegian girl, changed her name from that.

3. "You either have to go out, men and women, and find that these three men from Cloverton lied and the only men who can tell the truth are these section men who are responsible for this very accident or else you have to find that this plaintiff ought to recover, and I say the time, I doubt if it comes, when three men lo-king as honest and [fol. 659] hard working and square as those men, come into a court of justice—working over there at Cloverton in the wilderness, taking care of their families and their little children, they come here to you men and women and they have told you the living truth of the living God and no man knows it better than Fryberger. He has sat in this case, one of the keenest, able corporation lawyers in the great state of Minnesota, a man cool, calculating and who has been the guiding spirit in this defense. He has sat here, men and women, suggesting to Mr. Boyle what steps he should take and what he should ask.

4. "The law is that a servant has a right to assume that when he is sent into a place to work those having charge of it, as these section men, have performed their duty. Those are the men who are responsible for this accident. . . . This railroad company has tried this case cleverly. They have tried to raise a cloud of dust against a case that I cannot for the life of me see why they are fighting. Not only that, but the court will charge you on assumption of risk that he cannot assume risks arising from the negligence of fellow servants, unless he knows of that danger, and he did not know about it. The ice was covered with snow, so he goes in there. Now, that is all there is to assumption of risk.

5. "We come now to the measure of damages. What should this man recover? Now, I know something about juries. I think I know something about the difficulties of trying these cases. I think I know something about the [fol. 660] difficulties of a man, single handed, fighting a

powerful corporation. I think I know something of the feeling of superiority that sometimes reposes in the breasts and hearts of men who represent corporations. I think I know somewhat the handicaps that may surround a man who will fight for what they call the underdog. I have tried cases under those laws as far west as Montana and as far east as the state of Ohio. I have addressed juries in those states in behalf of injured men and the widows and orrphans of men who were killed, and I want to say to you men and women of Crow Wing county, never in my life have I seen as ingenious and dishonest a defense as is put up in this case.

6. "Here comes a man in the prime of life, forty-six years of age, giving to this mighty railroad eighteen of the best years of his life, working for them, and because of their negligence and because of the laziness of these section men, he is hurled from the top of a moving car, fourteen to twenty feet, weighing 212 pounds, landing on his feet on the solid ice and ground below and falling on his back, and but for the providence of Almighty God, had he not turned himself away, he would have been crushed under the moving wheels of that car. And we find a railroad company coming into court to fight that man and send him out of this court room stamped as a cheat and a fraud. Moquin has told you the truth. If these three men from Cloverton had never come here, the testimony of that simple, honest man, standing alone, would be enough to con- [fol. 661] vince any honest man or woman that the Soo Railroad, in common decency and common honesty, if they possess it, should pay this man. I want to say to you men and women I do know what it costs to fight a railroad. It is hard. It is not easy. It is hard. I know that oftentimes as I try these cases—and I am not an extremely religious man, but perhaps from a good mother I have learned at times to even ask the aid of a divine power to give me strength to present cases honestly.

7. "Now, we come again, as I say, to the question of damages. Mr. Boyle, in his magnanimity, I presume—I can't imagine what else—this morning suggested to this jury that you ought not to give him over $6,000.00 and you ought to cut that. Well, I want to tell you if there is a man or woman on this jury that wants to listen to that kind of

argument in a case of liability to give this man that amount, go out there and don't you give him a red penny. He is not asking for a dollar he has not lost. This man is not asking for a red cent that is not his. But by the eternal gods he is entitled to what he has lost and it is not $6,000.00, as we discuss this testimony. And let me tell you if this jury should bring in $26,000.00, the first men to send a wire to Minneapolis and laugh would be Fryberger and Boyle.

8. "It has appeared by Dr. Rees, if you believe him, that he can never railroad again. Dr. Schnell says that he can do some kinds of railroad work, such as a conductor, but not as a brakeman. Now, he don't have a run as a con-
[fol. 662] ductor and he never could get it, because there isn't a railroad company in the world that would hire him in that condition and you know that. So what will he do? I can see him, along with thousands of others, marching, dragging himself up to the doors of the factories and the work shops of America, and I can see him applying for work and by his side see thousands of men out of employment, with two strong arms and two solid legs and a solid back, in competition against him. Who is going to hire him? Just stop and think about it. He is handicapped for life. He goes out into an economic world, men and women, handicapped by the negligence of his master and when he raps at the door and says, "I want to work," by the side of him is a strong man who says, "I want to work and I will work for the same wages and there is not a thing the matter with me," who is going to be hired?

9. "Aren't you more than fair to say that a man whom Dr. Boyer says and Dr. Kuth says can never railroad as a brakeman again with safety to his life, has taken and given twenty years of his life to that work, aren't you fair by this railroad company when you say to them, 'Well, we will just simply cut what he was earning right in two and say that he can earn $125.00 a month'? I don't know where he will earn it, do you? Do you think he could go into a factory and get $125.00 a month? Do you think he could go and run a farm and get $125.00 a month? Oh, no. Let us be fair. Then what does it mean? It means that if he has lost that, if he has lost that amount, just half, it means
[fol. 663] that if he has lost half of his wages and you are fair by this company and he has lost $125.00 a month for

twenty-five years, he has lost $37,500.00, giving the railroad company half of what he is earning now. Why, men and women, six months from now he has already lost $4,800.00 —three months from now. Three months from now the wages alone, outside of his pain and suffering that Mr. Boyle so graciously told you he was entitled to receive, he has lost practically $4,800.00. Nine months from now the $6,000.00 that Mr. Boyle suggested will be all gone and Boyle suggests you take some of that away from him. Well, I want to say before you bring in a contemptible verdict of $6,000.00, come in here and tell Moquin to go out of this court room without a dollar. Let us be honest about those matters. This man is a cripple for life. He has lost his vocation in life.

10. "Now, there is one thing I know from experience in talking to jurymen and jurywomen, and that is that frequently we got preconceived ideas of what we should give or what we should do. I want to say this. In this case it is important to Moquin and important to the railroad company. It would be a terrible thing if you men and women went out and said, 'Oh well, we will compromise. Instead of giving this man $37,500.00—I think the evidence entitled him to it—we will give him around $20,000.00 and compromise our verdict.' I think it would be a terrible thing if in ten years from now you, in the same condition, could not earn a livelihood, could earn probably $60.00 a month. Is [fol. 664] there any reason why you should do it? Is there any reason why you should take away from this man one cent that he has coming? I say to you men and women I have tried cases long enough to know human nature and before this jury brings in a verdict of that kind, as a tribute to the line of defense the Soo Line has put in here, don't bring this man a dollar. Send him out stamped as a fraud, a cheat, a faker, rather than give him a verdict that he is not entitled to.

11. "Let me say this. There is a five-sixths jury law in this state. I hope this jury agrees, but I want to urge this jury that if the men and women of this jury believe that this man should receive $37,500.00 and if someone should say there was slight contributory negligence on his part, I say before you bring in a verdict that will be an insult of the law, leave this man a pauper and beggar to go upon the

streets, I say to you men and women who believe in justice and right and fairness, stand out there your twelve hours and write your names upon the verdict and bring it in and let the world read it. I am not here pleading for sympathy. I am not here pleading for anything but the common justice that a laboring man is entitled to, and the time must never come, men and women, when a man who works for a living, when a man who works for a great and mighty railroad company, cannot walk into the courts of justice and there have his rights determined as fairly and as honestly as though he were the highest man in the land.

[fol. 665] 12. "You take this case and when you write that verdict write it with an eye to justice and to honesty and to fairness, and when you bring your verdict in, that man, stranger though he may be to you, will be waiting here to receive your verdict. It is not a matter of importance whether the verdict satisfies me or not. It is not a matter of importance whether the verdict satisfies Mr. Fryberger or Mr. Boyle, but it is a matter of importance that you do not take a dollar away from this man that he has lost, and I want to say that he has lost, if you are fair by this railroad company, $37,500.00 if you say he can earn half of what he was earning before he was hurt, and if you even went further than that and said he could earn two-thirds of it, he would be entitled to practically $26,000.00, if you gave the railroad company all the leeway, and yet I am surprised to hear counsel suggesting the miserable amount he did suggest, and I say again before you bring in that kind of a verdict, don't bring in any. I would rather see this jury disagree and if this fight must go on for two years longer I can only assure that man and this jury that if God lets me live, he will find me fighting to get him justice in the courts of this land, and that is what he is entitled to. And I want to say if this Soo Railroad could give back to this man his good health, could give back to him the ability to work, could give back to him the ability to railroad, we would take every dollar that the Soo Railroad ought to pay this man and we would hurl it back into their faces as a worthless rag.

[fol. 666] 13. "I think you men and women have learned something about how hard a man has to fight against a

railroad company, if you have learned nothing else. I think you men and women have been very fair and patient in your consideration and I bring you this man, forty-six years of age, in the prime of life, looking ahead with hope, with aspiration, with an opportunity to advance, and by the negligence of this railroad company, every bit of that is wiped out and the only thing that can compensate him for his pain and suffering and the loss of his profession is a miserable amount of money. Even if he got every dollar he sued for in this case, $60,000.00, it would never compensate him. There is no amount of money that can compensate a man when life's vision is obliterated and I say, 'Give him what he has lost,' and that is $37,500.00, and it is a just and an honest verdict."

XI

The damages are excessive and appear to have been given under the influence of passion or prejudice.

Said motion and all thereof will be based upon the record in said action, the settled case, the exhibits introduced or offered in evidence and made a part of the settled case herein, and all of the files, records and proceedings in said action.

Fryberger, Fulton & Boyle, Duluth, Minnesota; John E. Palmer, Minneapolis, Minn., Attorneys for Defendant.

(Served August 27th, 1929.)

[fol. 667] In District Court of Crow Wing County

Order Denying Motion for Judgment, etc.

This matter came on for hearing before the undersigned, one of the judges of this court, in the city of Bemidji, in said judicial district, on the 9th day of September, 1929, upon motion of said defendant that judgment be ordered and entered herein in favor of defendant notwithstanding the verdict of the jury in favor of the plaintiff, or in case said motion for judgment notwithstanding the verdict be

denied, for an order setting aside the verdict of the jury and granting defendant a new trial in said action, said motion being based upon the settled case and all the files, records and proceedings in said action.

Messrs. Fryberger, Fulton & Boyle and John E. Palmer appeared on behalf of said defendant and in support of said motion, and Messrs. Davis, Michel & Yaeger and Swanson, Swanson & Swanson appeared on behalf of said plaintiff and in opposition thereto.

And the court having heard and considered the arguments of counsel and being fully advised in the premises,

It is ordered that said motion be and the same is hereby, in all things, denied.

Let judgment be entered accordingly after thirty days from the date hereof.

Dated October 17, 1929.

Graham M. Torrance, District Judge.

[fol. 668] In District Court of Crow Wing County

Notice of Appeal to Supreme Court

To the above-named plaintiff and Davis, Michel & Yaeger, attorneys for plaintiff, and to W. A. M. Johnston, clerk of the above-named court:

You will please take notice:

That defendant, Minneapolis, St. Paul & Sault Ste. Marie Railway Company appeals to the Supreme Court of the state of Minnesota from the order of said District Court entered herein on the 17th day of October, 1929; wherein it is ordered that the motion of defendant for judgment notwithstanding the verdict be and the same is denied; and wherein it is further ordered that the motion of defendant for a new trial be and the same is denied. Said appeal is taken from said order and from the whole thereof.

Dated November 9, 1929.

Fryberger, Fulton & Boyle, 712 Lonsdale Building, Duluth, Minnesota; John E. Palmer, 1427 First Nat'l-Soo Line Bldg., Minneapolis, Minnesota, Attorneys for Defendant.

(Served on Davis, Michel & Yaeger, attorneys for plaintiff, and service admitted September 9th, 1929. Served on clerk of the District Court of Crow Wing county and service admitted November 12th, 1929.)

[fol. 669] : In District Court of Crow Wing County

Waiver of Appeal Bond

Defendant in the above entitled action being desirous of appealing to the Supreme Court of Minnesota from the order of the said District Court entered herein on October 17, 1929, denying defendant's motion for judgment notwithstanding the verdict or for a new trial, plaintiff does hereby specifically waive the giving of a bond by defendant on said appeal and agrees that said appeal may be taken and all proceedings stayed and superseded as though supersedeas and cost bonds were given as required by Sections 9501 and 9499 of the 1923 Minnesota Statutes.

Dated November 9, 1929.

Davis, Michel & Yaeger, Attorneys for Plaintiff.

[fol. 670] [File endorsement omitted.]

In Supreme Court of Minnesota

Crow Wing County

Wilson, C. J.; Dibell, J., Dissents in Part; Stone, J., Dissents

No. 194. 27842

Noah Moquin, Respondent,

vs.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Appellant

Opinion—Filed June 27, 1930

Syllabus

Plaintiff, a brakeman, seeks to recover under the Federal Employers' Liability Act for injuries suffered because

of the derailment of a box-car upon which he was riding. Held, that:

1. The questions of defendant's negligence and plaintiff's contributory negligence and assumption of risk were for the jury.

2. The Court's omission to use the word "reasonably" preceding the word "safe" relative to the place of work was an inadvertence and because of other portions of the charge it would not have been understood as meaning that defendant was an insurer of the safety of the place to work.

3. The withdrawal of the company rule 102 from the consideration of the jury after receiving it in evidence was not error.

4. An employe assumes the risk of dangers normally incident to the work in which he voluntarily engages so long as they are not attributable to the employer's negligence. The employe has a right to assume that his employer has exercised proper care with respect to providing a safe place to work.

5. An employe cannot recover damages for injury caused by the defect which his work required him to repair.

[fol. 671] 6. When counsel uses improper and prejudicial remarks in his argument to the jury it is the duty of his adversary to then and there call the court's attention to them and have the record show the language used.

7. Verdict of $27,500.00 held excessive and conditionally reduced to $22,500.00.

Opinion

Defendant appealed from an order denying its alternative motion for judgment non obstante or a new trial.

Plaintiff, 46 years old, has worked for defendant 28 years. He was working as a brakeman at the time of his injury, Feb. 27, 1928. The conductor was Mr. Rennie and Mr. Dan G. Carr was the other brakeman. Plaintiff was injured at Cloverton, Minn., because of the derailment of a box car upon which he was riding while engaged in his

work. The main line runs north and south. The depot is to the east. To the west is a passing track. Further to the west is a house track. A street crossing passes over the tracks just south of the depot.

Early in the morning the conductor received an order from the chief train dispatcher saying, "Do a good job of flanging today and advise what tracks you flange out." The conductor advised the two brakemen thereof and told them to look after the work. Flanging is done with an apparatus called a "flanger" which is fitted over the front of the pilot of the locomotive. It is raised and lowered by air power and operated by the engineer. It is used by the engine moving forward. Between the rails it extends one and three-fourths inches below the top of the rails. Its purpose is to throw out the snow from between the rails so that the flanges of the car wheels won't come in contact with ice or snow and be d-railed. It moves snow, not hard ice. A bull-dozer is used for deeper snow work. It is the duty of section men to remove ice and snow from crossings and switches only.

Flanging was done at each of the villages until the train reached Cloverton. There the house track was under [fol. 672] snow. Perhaps it was eight to twenty inches deep. On the southerly portion of the house track was an empty car. A short distance to the north from this empty car and on the house track was a box car loaded with ties. This car stood near the street crossing. It was to be picked up and put in the train. It stood almost midway on the house track. The conductor gave directions to plaintiff, saying: "Tell Dan (Mr. Carr, the head brakeman) to back in on the house track and after he couples on to that car of ties to shove down, back down on the house track and flange it out." Thereupon plaintiff went to the crossing on the house track. He then climbed upon the car loaded with ties and released the brakes. The engine pushed the empty car up to the car of ties and brakeman Carr also climbed upon the latter. The movement then, as these men intended, was to go northerly to the north end of the house track and flange back thereon, pass onto the main line, attach the carload of ties to the train, then set the empty car back on the house track, then move the engine back to the train. But soon after starting the northerly

movement of the car with the ties, it derailed, throwing plaintiff to the ground, causing his injuries.

1. Under the plaintiff's testimony he was acting under orders of the conductor and engaged in a switching movement. His testimony is to the effect that, under the snow, ice had been permitted to accumulate so as to be over an inch thick above the rails. The claim is that this was known to defendant's section foreman; that such ice was the cause of the derailment. Plaintiff testified that he had no duty in reference to the flanging operation but that his presence on the derailed car was due to his duty relative to putting that car in the train.

Defendant denied plaintiff was engaged in a switching movement and denied the presence of such ice. It claimed plaintiff was engaged in a flanging movement. It further urged that the proper way to do the flanging on the house track would have been for the locomotive to have backed north on the side track and then flanged the house track by a forward southerly movement. It also now claims that such deep snow on the house track was sufficient to cause a [fol. 673] derailment. It is said that this probably was intensified by the fact that the snow was slightly thawing. Defendant's claim is that the house track was dangerous, not because of the presence of ice as claimed, but because of the deep, damp snow, and that plaintiff in his own way was engaged in making a dangerous place safe.

There was a temporary crossing over the house track only. It was used by men crossing it with teams and sleds and by teams dragging the eveners behind the horses, with logging chains. Plaintiff's evidence is that ice was thus formed an inch or two above the rails. That it was hard. Different witnesses said that they saw it. That when the car upon which plaintiff was riding struck this ice at this crossing it was derailed. Defendant's evidence puts the derailment before it reached the crossing, and attempts to attribute the derailment to the presence of the snow only.

Under the evidence, it was for the jury to determine whether plaintiff's claims were true. Defendant's claims were presented in opposition to the plaintiff's contention. This included the question of negligence, contributory negligence, and assumption of risk. The jury has com-

mitted us to plaintiff's version. The evidence is sufficient to sustain these findings.

2. The Court instructed the jury that plaintiff claimed that defendant failed to exercise proper precautions to ascertain whether the track was in a reasonably safe condition for the passage of cars. Then in two places in the charge the court made reference as to whether the house track was safe. He should have used the word "reasonably" before the word "safe". The court did charge the jury that defendant must exercise a degree of care commensurate with the risk. It was also stated that if the snow and ice remained upon the track a sufficient length of time to have enabled the defendant, in the exercise of ordinary and reasonable care, to have discovered its presence it would be negligent if the condition was as claimed.

Plaintiff assigns as error the failure of the court to use the word "reasonably" before the word "safe" to which [fol. 674] we have referred. Concededly, it should have been used. Obviously, its omission was an inadvertence. Counsel failed to call the court's attention to it. Under the well established rule, it cannot now be urged as error. It is to be noted that the court told the jury that plaintiff claimed defendant had failed to exercise proper precaution to ascertain whether the track was in a "reasonably safe condition". The jury was told that the law required defendant to "exercise a degree of care commensurate with the risks to prevent the accumulation of ice and snow in such quantity, form and location as to be a menace to the safety of the employes working in the yard."

The rule is that defendant was bound to exercise ordinary care only to keep the house track in a reasonably safe condition for service. We are of the opinion that the instructions taken as a whole did not lead the jury to believe that the defendant was an insurer of the safety of the place to work. Defendant's duty is to guard against only such accidents as are likely to happen from the usual and common experience of mankind.

3. Upon the trial defendant put in evidence its rule 102 reading:

"102. Movement over Highway Crossings. In the movement of engines with or without cars switching over high-

way grade crossings within yard limits, commercial and station sidings, mine, industrial, or passing sidings; unless there is a crossing watchman at his post, or the gates are down, a member of the train or engine crew will protect highway traffic at crossings by preceding each movement over the crossings and see that all highway traffic has been stopped before signalling the engineman to proceed."

When the court instructed the jury it withdrew this exhibit rule 102 from its consideration. This was not error. Upon the record it is doubtful if plaintiff had violated the rule but, if so, such violation had no causal connection with the injury.

4. Defendant assigns as error the refusal of the court to give its request No. 7, to the effect that the plaintiff in his employment assumed the risks arising from dangers ordinarily and naturally incident thereto; and that he also assumed the risks arising from dangers created by the [fol. 675] master's negligence, provided he knew, or in the exercise of ordinary care should have known, of such dangers, and appreciated the risks arising therefrom. The request also was to the effect that the employe is bound to inform himself by all reasonable means concerning the perils of his employment; that he must exercise his intelligence; and that when a situation suggests investigation and inspection in order that its dangers may be fully disclosed he is under the obligation of investigation and inspection.

The test relative to assumption of risk is not in the exercise of ordinary care to discover dangers by the employe, but whether the fact is known or plainly observable by him. He is not charged by law with the assumption of risk arising out of an unsafe place to work provided by his employer unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to working in or at such place. An employe assumes the risk of dangers normally incident to the work in which he voluntarily engages so long as they are not attributable to the employer's negligence. The employe has a right to assume that his employer has exercised proper care with respect to providing a safe place to work. Gila Valley G. & N. R. Co. v. Hall, 232 U. S. 94; Chesapeake

& O. R. Co. v. De Atley Co., 241 U. S. 310; Suess v. Arrowhead Steel Products Co., — Minn. — (filed recently).

5. The law is that an employe cannot recover damages for injury caused by the defect which his work required him to repair. Broderick v. St. Paul City Ry. Co., 74 Minn. 163. Defendant now argues that it was the duty of the court to so instruct the jury. Defendant requested no such instruction. The court instructed as to contributory negligence and assumption of risk. At the request of defendant the court gave this charge:

"If you find from the evidence that the plaintiff Moquin was chargeable with the duty of seeing that the house track was safe before backing the car which was derailed into the snow on the track, and if you find that the accident and injury resulted solely from his failure to perform such duty and to ascertain that said track was safe before backing the car into the snow; then I charge you as a matter of law that the plaintiff cannot recover in this action and your verdict must be for the defendant."

[fol. 676] Upon trial defendant continually showed hostility toward plaintiff's theory of the case, claiming that the movement was a flanging movement and not a switching movement as claimed by plaintiff. One of its many exceptions was in this form:

"The defendant excepts to all that part of the court's charge which, in substance, tells them that it was the duty of the defendant to furnish a reasonably safe place for the plaintiff to work, inasmuch as there is no evidence of any nature or description that the place to work was not safe, and on the further ground that these men, including the plaintiff, were furnished with perfectly safe equipment for the purpose of taking care of the snow and make the track safe for use."

The record contains over 2000 folios but we are unable to find any reference to the rule of law of the Broderick case. We are compelled to conclude that this specific rule was never mentioned upon the trial. Defendant's attitude toward assumption of risk and contributory negligence is made clear. Its large number of requests indicate that they were to cover defendant's theory of the case. Upon

the record the failure to give such an instruction was not error, although it would have been a proper instruction had it been called to the attention of the court.

6. Appellant assigns misconduct of counsel in the argument to the jury. No objections or exceptions were made and taken at the time of the argument. The record was not protected. Counsel for defendant adopted a course which this court does not approve. They had the argument of plaintiff's counsel taken and made a part of the settled case and then sought to assign as error portions thereof in the motion for a new trial. Little justification can be made of parts of the argument. When counsel uses in his argument to the jury improper and prejudicial language, it is the duty of opposing counsel then and there to interrupt and have such language put upon the record and to ask the court to instruct the jury to disregard it and also to take an exception thereto if he thinks it advisable. It is the duty of the court to have the record show substantially what has been said in the course of the argument to which the objection is made. In the absence of objection from counsel, it may become the duty of the court to act on [fol. 677] its own motion. The rule of procedure in such case rests upon deep principles from which we should not depart. It is the settled practice. Christofferson v. Custom Laundry Co., — Minn. —, 229 N. W. 136; State v. Peterson, 167 Minn. 216; State v. Cotter, 167 Minn. 265; Estate in re Weber, 163 Minn. 389. It gives an opportunity for correction or retraction.

7. Plaintiff was 45 years of age. He earned about $3000.00 per year. His expectancy was 25.54 years. The shin bone was broken in several pieces in an oblique manner from the ankle joint upward; there were two long parallel breaks and then there was some splintering between them. It was a comminuted fracture. One of the breaks went down into the end of the bone at the ankle joint. The shin bone is now enlarged to the extent of ¾ of an inch when measured around and it is changed in shape and contour and has very little movement. It is inclined to be stiff. There is a firm, bony union. The right leg is ¼ inch shorter. There was also a slight fracture in the smaller bone of his leg. The leg was put in a cast in course of treatment. The left foot and ankle were swollen and dis-

colored. Plaintiff does not now walk normally. The elbow joint was injured and is abnormal. There is a diminished sensation of feeling in the last two fingers. There is a permanent impairment in his use of the right leg and right arm. There was an injury to the coccyx bone, which prevents plaintiff sitting straight and necessitating a leaning forward; the permanence thereof is left uncertain. He will not be able to work as a railroad brakeman. There will be much work that he can do. He has suffered pain. Some of his pain in the back may be due to strained ligaments. He has lost sleep and weight. At the time of trial he had lost about 15 months time and was still unable to work.

We cannot minimize the importance of the claim that a man who has spent so many years in following his chosen calling suffers a peculiar hardship when he is incapacitated to continue therein and is thereby forced, at plaintiff's age, to take up another line of work.

The verdict was $27,500. From the entire record before [fol. 678] us we are of the opinion that the verdict is excessive because of passion and prejudice. A new trial is granted unless plaintiff shall, within fifteen days after the filing of the remittitur in the district court file a written consent to a reduction of the verdict to $22,500, in which event the verdict so reduced shall stand.

Affirmed on condition.

IN SUPREME COURT OF MINNESOTA

DISSENTING OPINION

DIBELL, J., dissents in part:

I do not agree that passion or prejudice is shown and that there should be a reduction of damages. The verdict should stand. Otherwise, I am in accord with the opinion.

IN SUPREME COURT OF MINNESOTA

DISSENTING OPINION

STONE, J., dissenting:

Settled practice notwithstanding, I hesitate to say that a plaintiff shall not have more than so much by way of

damages. That is the jury's function. The condition that plaintiff may have a new trial is an apparent rather than a real benefit to him. On the other side, we are refusing defendant the right to trial by another jury which, it is to be presumed, would try all the issues fairly. The opinion demonstrates that the first jury yielded to passion and prejudice in assessing damages. There can be no escape from that conclusion when the verdict is compared with those customarily rendered where a farmer or ordinary artisan is the plaintiff and the defendant not a railway company. The kind of argument resorted to by plaintiff, together with the excessive verdict, call for a new trial.

To me, the result seems a compromise with settled rules. We find in the verdict plain evidence of the influence on the jury of passion and prejudice and in the argument of counsel for plaintiff its probable source. Yet we grant to the aggrieved party but a small portion of the relief such a combination normally demands. It is for that reason, I am unable to agree to the result.

[fol. 679] IN SUPREME COURT OF MINNESOTA

27842

NOAH MOQUIN, Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant

JUDGMENT—Filed July 8, 1930

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the Order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Crow Wing be and the same hereby is in all things affirmed on condition in accordance with opinion filed herein.

And it is further determined and adjudged that Appellant herein, do have and recover of Respondent herein the sum and amount of Six Hundred and Forty and 45/100 Dollars ($640.45) costs and disbursements in this cause

in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed July 8th, A. D. 1930.

By the Court.

Attest:

Grace Kaercher Davis, Clerk, by Peter O. Scow, Deputy. (Seal.)

[fol. 680] Clerk's certificate to entry of judgment omitted in printing.

[File endorsement omitted.]

[fol. 681] IN SUPREME COURT OF MINNESOTA

MANDATE

STATE OF MINNESOTA, ss:

SUPREME COURT

The State of Minnesota to the Honorable Judge and officers of the District Court within and for the County of Crow Wing, Greeting:

Whereas lately in your Court, in an action therein pending entitled Noah Moquin, Plaintiff, and Minneapolis, St. Paul & Sault Ste. Marie Railway Co., Defendant, a certain order was entered therein October 17th, 1929, from which action of your Court an appeal thereafter was taken to this Court;

And whereas the said cause came on to be heard before our Supreme Court, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the Court below herein appealed from, be, and the same hereby is, in all things Affirmed on condition in accordance with opinion filed herein and that judgment be entered accordingly. A copy of the entry of judgment thereupon in this Court is herewith transmitted and made part of this Remittitur.

Now, therefore, This Mandate is to you directed and certified, to inform you of these proceedings had in our Su-

preme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith remanded to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

Witness the Honorable Samuel B. Wilson, Chief Justice of the Supreme Court aforesaid, and the seal of said Court at St. Paul, this July 19, 1930.

Grace Kaercher Davis, Clerk of the Supreme Court.
Peter O. Scow, Deputy. (Seal.)

Filed July 2, 1930. W. A. M. Johnston, Clerk.

[fol. 682] In District Court of Crow Wing County

[Title omitted]

Consent to Reduction of Verdict—Filed July 8, 1930

The Supreme Court of the State of Minnesota having granted a new trial in the above entitled action, unless the plaintiff consent to a reduction of the verdict,

Now, therefore, Plaintiff hereby consents to the reduction of the verdict in the above entitled action to the sum of Twenty-two Thousand Five Hundred ($22,500.00) Dollars.

Dated this 30th day of June, 1930.

Noah Moquin, Plaintiff. Davis, Michel & Yaeger, Swanson, Swanson & Swanson, Plaintiff's Attorneys.

[File endorsement omitted.]

[fol. 683] In District Court of Crow Wing County

[Title omitted]

Stipulation as to Costs and Entry of Judgment—Filed July 21, 1930; in Supreme Court July 28, 1930

Whereas, on June 27, 1930, the Supreme Court of Minnesota did make and file its decision herein granting defend-

ant a new trial unless plaintiff, within 15 days after the filing of the remittitur herein, should file a written consent to the reduction of the verdict of $22,500, in which event the verdict so reduced should stand, and whereas plaintiff has now so filed said consent; and

Whereas, on the 8th day of July, 1930, there was entered in said Supreme Court of Minnesota, a judgment in favor of defendant against plaintiff for defendant's costs and disbursements properly taxable in said Supreme Court, in amount of $640.45; and

Whereas, in consideration of this stipulation defendant has consented to the going down of the remittitur without payment of its said Supreme Court judgment:

It is therefore agreed and stipulated; that said verdict as so reduced and accrued interest thereon, together with plaintiff's costs and disbursements properly taxable in said District Court, now aggregates the sum of $24,402.68; that there shall be deducted therefrom the amount of defendant's said Supreme Court judgment, leaving a balance of $23,762.23 to be entered in said District Court as plaintiff's judgment against defendant.

[fol. 684] It is further stipulated that if defendant shall fail to ultimately obtain reversal of said judgment it will satisfy its said judgment for costs in the Supreme Court of Minnesota; that if defendant shall obtain reversal of plaintiff's judgment now to be entered and plaintiff shall ultimately have any recovery upon his alleged cause of action herein, the amount of defendant's said Supreme Court judgment shall be deducted therefrom.

Nothing herein shall be construed as a stipulation or consent by defendant to entry of judgment so as to preclude, or interfere with, its full right to appeal therefrom to the Supreme Court of Minnesota or its full right to petition the Supreme Court of the United States for writ of certiorari to review final judgment, if such a judgment shall be entered against it by and in the Supreme Court of Minnesota.

Dated July 15, 1930.

Davis, Michel & Yaeger, Swanson, Swanson & Swanson, Attorneys for Plaintiff. Fryberger, Fulton, & Boyle, John E. Palmer, James L. Hetland, Attorneys for Defendant.

[File endorsements omitted.]

[fol. 685]. In District Court of Crow Wing County, Fifteenth Judicial District

Noah Moquin, Plaintiff,

vs.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Defendant

Judgment—Filed July 2, 1930

The above entitled action, being regularly upon the calendar of the above named Court for the May, 1929, general term thereof, came on for trial before the Court and a jury duly impaneled and sworn to try the same, on the 20th day of May, 1929, which said jury did, on the 25th day of May, 1929, duly render a verdict herein in favor of the plaintiff in the sum of Twenty-seven Thousand Five Hundred Dollars:

And thereafter said Court having made and filed its order herein denying defendant's motion for judgment notwithstanding the verdict or a new trial, said cause was appealed to the Supreme Court of Minnesota; and thereafter and on the 21st day of July, 1930, said Supreme Court duly filed herein its mandate granting defendant a new trial unless plaintiff, within fifteen days after the filing of the remittitur in this Court, should file a written consent to the reduction of said verdict to Twenty-two Thousand Five Hundred Dollars, in which event the verdict so reduced should stand; and whereas plaintiff on the 8th day of July, 1930, ful-y filed in this Court written consent to such reduction of said verdict:

Now, on motion of Davis, Michel & Yeager, Esqs. and Swanson, Swanson & Swanson, Esqs., attorneys for plaintiff,

It is hereby adjudged that plaintiff do have and recover of defendant the sum of Twenty-two Thousand Five Hundred Dollars; together with the sum of Twelve Hundred Sixty-two and 23/100 Dollars interest, costs and disbursements taxed and allowed herein, in accordance with stipula-
[fol. 686] tion and agreement of the parties filed herein as to the amount thereof; in all in the sum of Twenty-three

Thousand Seven Hundred Sixty-two and 23/100 Dollars ($23,762.23).

Dated July 21, 1930.

By the court.

W. A. M. Johnston, Clerk of said District Court.

(Seal of the District Court.)

[File endorsement omitted.]

[fol. 687] In District Court of Crow Wing County

[Title omitted]

Notice of Appeal to the Supreme Court

To the above-named plaintiff and to Messrs. Davis, Michel & Yaeger and Messrs. Swanson, Swanson & Swanson, attorneys for said plaintiff, and to W. A. M. Johnston, clerk of said District Court:

Please take notice that defendant Minneapolis, St. Paul & Sault Ste. Marie Railway Company hereby appeals to the Supreme Court of Minnesota from the judgment rendered, entered and docketed in the above entitled action on July 21, 1930, in favor of plaintiff and against defendant in the sum of Twenty-three Thousand Seven Hundred Sixty-two and 23/100 Dollars ($23,762.23); and from the whole of said judgment. In connection with its said appeal said defendant makes and specifies the hereto annexed assignments and specifications of error, which it avers occurred in the entry of said judgment and in the proceedings had and taken prior to and leading up to the same; upon which errors defendant will rely for a reversal of said judgment, in addition to all other assignments of error appearing in the record herein.

Dated July 22, 1930.

John E. Palmer, James L. Hetland, 1427 First Nat'l Soo Bldg., Minneapolis, Minnesota; Fryberger, Fulton & Boyle, 712 Lonsdale Building, Duluth, Minnesota, Attorneys for Defendant.

[fol. 688] IN DISTRICT COURT OF CROW WING COUNTY

[Title omitted]

ASSIGNMENTS OF ERROR—Filed July 24, 1930; in Supreme Court July 28, 1930

Defendant, deeming itself aggrieved by the judgment entered in the above entitled action on the 21st day of July, 1930, in favor of plaintiff and against defendant, in connection with its appeal to the Supreme Court of Minnesota from said judgment, does hereby assign and specify the following errors, which it avers occurred in the entry of said judgment and in the proceedings had prior thereto, upon which errors, in addition to all other assignments of error shown by the record herein, defendant relies for reversal upon this appeal; to-wit:

I

The Court erred in permitting recovery herein upon rights asserted under the Federal Employer's Liability Act, April 22, 1908, c. 149, 35 Stat. 65; as amended April 5, 1910, c. 143, 36 Stat. 291, for the reason that negligence on the part of defendant proximately causing, or proximately contributing to, plaintiff's injuries was not established by substantial evidence as is required in actions under said Act.

II

The Court erred in permitting recovery herein under the Federal Employer's Liability Act aforesaid, for the reason that the evidence established that plaintiff's injuries were caused solely by his own negligence in doing his work in an [fol. 689] unsafe, improper and unnecessarily dangerous manner and in violation of reasonable rules established by defendant for the safety of its employes, and its equipment and the public and to promote the safety of railway operations.

III

The Court erred in permitting recovery herein under the Federal Employer's Liability Act aforesaid, for the reason that the evidence established that plaintiff assumed the risks of riding upon the top of the car knowing that the car was

being backed up on a track known by him to be covered with snow and in an unsafe condition for such a car movement.

IV

The Court erred in permitting recovery herein under the Federal Employer's Liability Act for the reason that plaintiff assumed the risks arising from the work of making a dangerous place safe, to-wit, the flanging out of the house track and removing ice and snow therefrom for the purpose of making the same safe for subsequent car movements thereover.

V

The Court erred in permitting recovery herein under the Federal Employer's Liability Act aforesaid, for the reason that the evidence established that plaintiff's injuries were occasioned by defects which he and his train crew were ordered to repair and were engaged in repairing at the time such injuries were sustained.

VI

The Court erred in permitting recovery herein under the Federal Employer's Liability Act aforesaid, for the reason that the evidence was not sufficient to sustain a finding that plaintiff was acting within the line of his duty when injured; that, on the contrary, the evidence established that plaintiff was not in the line of his duty, that his place of work was at the Main Street crossing on the ground and his duty that of protecting traffic at said crossing on the ground and his duty that of protecting traffic at said crossing and the evidence establishing that the alleged unsafe condition of the house track was not a breach of any duty owing by defendant to plaintiff.

[fol. 690]

VII

The Court erred in permitting recovery herein under the Federal Employer's Liability Act aforesaid, for the reason that there was no evidence sufficient to sustain a finding that the derailment of the car was caused by ice and not by snow properly removable by flanging operations; that on the contrary the evidence established that the derailment was caused by snow and occurred before the car reached

the point where plaintiff's evidence tended to show the icy condition of the track existed.

VIII

The Court erred in permitting recovery herein under the Federal Employer's Liability Act aforesaid, for the reason that the evidence established that plaintiff's injuries, if not caused solely by his own negligence, were caused by the joint negligence of himself and a joint employe of equal rank and authority in moving the car backwards over the house track without first making said track safe for the passage of cars thereover.

IX

The Court erred in refusing to direct the jury to return a verdict in favor of defendant as moved for at the close of all the evidence upon the trial and upon the grounds set forth in assignments I to VIII hereof (Printed Record, pp. 546-548; fols. 1368-1644).

X

The Court erred in refusing defendant's motion to set aside the verdict of the jury and to order judgment in favor of defendant notwithstanding said verdict, as moved for by defendant upon each and all of the grounds set forth in assignments I to VIII hereof (Printed Record, pp. 640-642; fols. 1919-1926).

XI

The Court erred in entering judgment upon, and in refusing to set aside, a verdict rendered by a jury manifestly actuated by, and under the influence of, passion and prejudice (Printed Record pp. 657-666; fols. 1971-1998).

[fol. 691] XII

The Court erred in refusing to set aside the verdict and grant defendant a new trial on the ground of misconduct of plaintiff's counsel in making highly prejudicial, inflammatory and unwarranted statements to the jury in his closing argument, which conduct deprived defendant of a fair

trial and subjected it to findings on all the issues by a jury actuated by passion and prejudice (Printed Record pp. 657-666; fols. 1971-1998).

XIII

The Court erred in failing and refusing to charge the jury that defendant was bound to use only ordinary care to provide plaintiff a reasonably safe place in which to work; and in failing and refusing to charge the jury in that connection that it was the duty of defendant to use ordinary care to keep the house track in a reasonably safe condition for the work which it had ordered to be done and which was in progress at the time plaintiff was injured (Printed Record pp. 645-647; fols. 1933-1936).

XIV

The Court erred in refusing to instruct the jury, as requested by defendant, that plaintiff, in engaging in the employment of brakeman on a railroad, assumed the risks arising from dangers ordinarily and naturally incident to that employment, and that he also assumed the risks arising from dangers created by the master's negligence, provided he knew, or was chargeable with knowledge of, such dangers and appreciated the risks arising therefrom; and in failing and refusing to give to the jury any concrete instruction as to what facts, if found, might constitute assumption of risks, as requested by defendant (Printed Record pp. 651-652; fols. 1951-1955).

XV

The Court erred in refusing to instruct the jury, as requested by defendant, that it was plaintiff's duty to do his work with due regard to his own safety and that if the jury should find from the evidence that plaintiff voluntarily chose an unsafe and dangerous method of doing his work, [fol. 692] when there was a safe method open to him and was thereby injured, he could not recover and the verdict must be for defendant (Printed Record p. 652; fols. 1954-1957).

XVI

The Court erred in refusing to instruct the jury, as requested by defendant, that if the jury found that it was

the duty of plaintiff to remain on the ground at the intersection of the public highway with the railway tracks, for the purpose of protecting traffic during the period when the derailment occurred, plaintiff could not recover and the verdict must be for defendant (Printed Record p. 653; fols. 1957-1958).

XVII

The Court erred in instructing the jury that the jury should not consider for any purpose defendant's Rule No. 102, or plaintiff's violation thereof, which rule required plaintiff to be on the ground at the Main Street crossing for the purpose of protecting traffic thereover, instead of being on the top of the box car the derailment of which caused plaintiff's injuries; said rule having a most vital and important bearing on the question of any negligence on the part of defendant toward plaintiff and on plaintiff's contributory negligence and his assumption of risks (Printed Record pp. 649-650; fols. 1946-1949).

XVIII

The Court erred in authorizing the jury to find defendant guilty of negligence for which plaintiff could recover if defendant had failed to prevent ice and snow from accumulating upon the house track and had thus failed to keep the same in a safe condition for the passage of cars; the evidence clearly establishing that the removal of ice and snow from the house track and making the same safe for the subsequent passage of cars was the work being done at the time of plaintiff's injury (Printed Record pp. 645-646; fols. 1934-1937).

[fol. 693] XIX

The Court erred in authorizing the jury to find defendant guilty of negligence for which plaintiff could recover if snow and ice had remained upon the house track a sufficient length of time so that defendant, by exercise of ordinary and reasonable care, should and could have known of such condition, or had actual knowledge of it for a sufficient time before the accident to remedy the same and should have anticipated that an accident might happen; the evidence clearly establishing that the work ordered and

being done was the removal of snow and ice from the house track so that a derailment might not happen, and the evidence further establishing that defendant was not chargeable with anticipating that cars would be backed into the snow and ice on the house track or that plaintiff would be on such cars.(Printed Record pp. 646-647; fols. 1937-1941).

XX

The Court erred in authorizing the jury to grant recovery to plaintiff for injuries caused by defective conditions which plaintiff and the other members of his train crew were engaged in remedying (Printed Record pp. 644-647; fols. 1931-1941).

XXI

The Court erred in assuming, and instructing the jury as a matter of law, that the work being done was the ordinary operation of switching cars in yards and in refusing to submit to the jury the question of whether the work in hand was a switching movement or the flanging out of tracks for the purpose of making the same safe for the subsequent switching of cars (Printed Record pp. 644-648; fols. 1931-1941).

XXII

The Court erred in failing and refusing to instruct the jury that if the derailment of the box car was caused by an accumulation of snow upon and about the house track such as would be ordinarily and properly removable by the operation of flanging and that if plaintiff was taking part in a movement only incidental to flanging, he could not recover [fol. 694] on account of an accident thus occasioned and in instructing the jury, in effect, that plaintiff might recover by reason of an accident so caused (Printed Record pp. 650-652; fols. 1949-1956).

XXIII

The Court erred in failing and refusing to submit to the jury the question whether the derailment was caused by concealed ice not properly removable by flanging or by snow properly so removable and in failing and refusing to submit to the jury, in that connection, the question of the precise point where the derailment occurred; and in fail-

ing and refusing to instruct the jury that if the derailment took place before the car reached a point where any condition of concealed ice existed, plaintiff could not recover (Printed Record p. 654; fol. 1960).

XXIV

The Court erred in failing and refusing to submit to the jury the question of whether plaintiff was engaged in the line of his duty when injured; as requested by defendant (Printed Record pp. 654-653; fols. 1955-1958).

XXV

The Court erred in failing and refusing to instruct the jury that if the jury should find that plaintiff's injuries were caused solely by the joint negligence of plaintiff and another employe of equal rank and authority, there could be no recovery and the verdict must be for the defendant (Printed Record p. 650; fol. 1950).

XXVI

The Court erred in submitting the case to the jury under what was claimed and stated to be the law of Minnesota; and in failing and refusing to submit the case under applicable rules of law as laid down by the Federal Courts (Printed Record pp. 645-646; fols. 1933-1941).

XXVII

The Court erred in refusing to set aside the verdict and grant defendant a new trial, as moved for upon each, as well as all, the grounds set forth in Assignments XI to XXV hereof (Printed Record pp. 644-666; fols. 1930-1999).

[fol. 695] In District Court of Crow Wing County

[Title omitted]

Waiver of Appeal Bond

Defendant in the above entitled action being desirous of appealing to the Supreme Court of Minnesota from the

judgment entered in said action on the 21st day of July, 1930, in favor of plaintiff and against defendant, in the sum of Twenty-three Thousand Seven Hundred Sixty-two and 23/100 Dollars ($23,762.23); plaintiff herein does hereby specifically waive the giving of a bond by defendant on said appeal, and agrees that said appeal may be taken and all proceeding stayed and superseded in like manner as though a supersedeas bond were given as required by statute.

Dated July 22, 1930.

Davis, Michel & Yaeger, Swanson, Swanson & Swanson, Attorneys for Plaintiff.

Due and personal service of the within Notice of Appeal and Assignments of Error is hereby admitted this 22nd day of July, 1930.

Davis, Michel & Yaeger, Swanson, Swanson & Swanson, Attorneys for Plaintiff. W. A. M. Johnston, Clerk of said District Court.

[File endorsements omitted.]

[fol. 696] In Supreme Court of Minnesota, 1930

28214

[Title omitted]

Stipulation re Submission of Cause on Printed Record and Briefs on Former Appeal—Filed July 31, 1930

Subject to the pleasure of the Supreme Court of Minnesota, it is hereby stipulated and agreed by and between the parties to the above entitled action:

1. That the appeal now pending herein in this Court; same being an appeal by defendant from final judgment entered July 21, 1930, in the District Court of Crow Wing County, Fifteenth Judicial District of Minnesota, in favor of plaintiff and against defendant in the sum of $23,762.23; may be, and is hereby, submitted to said Supreme Court of Minnesota for its decision, without argument, upon the

printed record, briefs of the parties and other proceedings had and taken in that certain action entitled Noah Moquin, Plaintiff-Respondent, v. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Defendant-Appellant, numbered 27842 upon the files and records of said Supreme Court, and being an appeal in this same cause from the order of said District Court of Crow Wing County denying defendant's alternative motion for judgment notwithstanding the verdict or a new trial.

2. That the record in this cause need not be printed by Defendant-Appellant upon this appeal and that no briefs need be filed by either party; the printing of such record [fol. 697] and the making and filing of such briefs being hereby expressly waived.

3. That if said judgment of said District Court aforesaid be affirmed, there be no remittitur to said District Court; the purpose of this stipulation being that if said judgment be affirmed final judgment may be entered thereon in this Court.

4. That nothing herein shall be construed as a stipulation or consent by defendant to the entry of any judgment against it or as a waiver of any of its assignments of error in the entry of any judgment; but that defendant expressly reserves and claims the right to have all questions arising in the entry of said judgment and proceedings prior thereto and leading up to the same reviewed by the Supreme Court of the United States if said Court shall grant a writ of certiorari upon defendant's petition therefor and that nothing herein contained or any act done in pursuance hereof shall be so construed as to interfere with the full right of defendant to have said cause fully reviewed upon its merits by the Federal Supreme Court if such review shall be granted.

Dated July 28, 1930.

Davis, Michel & Yaeger, Attorneys for Plaintiff-Respondent. John E. Palmer, James L. Hetland, Fryberger, Fulton & Boyle, Attorneys for Defendant-Appellant.

[File endorsement omitted.]

[fol. 698] IN SUPREME COURT OF MINNESOTA

Crow Wing County. Per Curiam

No. 194. 28214

NOAH MOQUIN, Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant

OPINION—Filed Aug. 8, 1930

Per Curiam:

The appeal is from a judgment. The case was here before and our opinion filed June 27, 1930. The questions involved upon this appeal are the same as those involved in the former appeal, and for the reasons given in the previous opinion and upon authority of that opinion the judgment from which this appeal was taken is affirmed.

[File endorsement omitted.]

[fol. 699] IN SUPREME COURT OF MINNESOTA

1930

[Title omitted]

PETITION FOR STAY—Filed Aug. 9, 1930

To the Honorable the Supreme Court of the State of Minnesota:

Defendant and Appellant in the above entitled action most respectfully petitions and represents:

That it feels itself aggrieved by the decision and order for judgment of this Court herein, affirming the order and judgment of the Court below and ordering the entry of final judgment in this Court.

Defendant and Appellant does therefore desire in good faith to petition the Supreme Court of the United States for

a writ of certiorari to review the final judgment of this Court, when entered, and will use all due diligence to prepare its petition and the record herein and will submit the same to the Supreme Court of the United States as soon as is reasonably possible.

Wherefore Defendant and Appellant prays the order of this Court staying all proceedings herein during the pendency of its application and petition to the said Supreme Court of the United States for writ of certiorari, and pro-
[fol. 700] ceedings had thereon.

Dated August 9, 1930.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Petitioner, by John E. Palmer, James L. Hetland, Fryberger, Fulton & Boyle, Its Attorneys.

[File endorsement omitted.]

[fol. 701] IN SUPREME COURT OF MINNESOTA

[Title omitted.]

ORDER STAYING PROCEEDINGS—Filed Aug. 9, 1930

Upon application of defendant and appellant in the above entitled action:

It is ordered that upon and after the entry of final judgment herein as directed by this Court in its decision and order made and filed on the 8th day of August, 1930; all proceedings herein and in the District Court of Crow Wing County, Minnesota, including the issuance of any writ of execution out of either Court, be, and hereby are, in all things stayed pending defendant's petition and application to the Supreme Court of the United States for a writ of certiorari, and proceedings had thereon.

Dated August 9, 1930.

S. B. Wilson, Chief Justice of the Supreme Court of the State of Minnesota.

[File endorsement omitted.]

[fol. 702] IN SUPREME COURT OF MINNESOTA

[Title omitted]

STIPULATION RE ENTRY OF JUDGMENT—Filed Aug. 9, 1930

It is hereby stipulated by and between the parties to the above entitled action through their respective attorneys, that final judgment may be entered in the above named Court in favor of the respondent and against the appellant for the sum of Twenty-three Thousand Eight Hundred Seventy and 30/100 Dollars ($23,870.39) and Clerk's fees.

It is further agreed that nothing herein shall be construed as a stipulation for consent by defendant to entry of judgment so as to preclude or interfere with its full right to petition the Supreme Court of the United States for a writ of certiorari to review final judgment entered herein.

Dated the 8th day of August, 1930.

Davis, Michel & Yeager, Attorneys for Plaintiff-Respondent. John E. Palmer, James L. Hetland, Fryberger, Fulton & Boyle, Attorneys for Defendant-Appellant.

[File endorsement omitted.]

[fol. 703] IN SUPREME COURT OF MINNESOTA

28214

NOAH MOQUIN, Respondent,

v.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant

JUDGMENT—Filed August 19, 1930

Pursuant to an order of the court heretofore duly made and entered in this cause, it is determined and adjudged that the judgment of the court below, herein appealed from, to-wit, of the District Court within and for the

County of Crow Wing, be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein do have and recover of appellant herein the sum and amount of Twenty-three thousand Eight Hundred Seventy and 39/100 Dollars ($23,870.39), final judgment in this cause in this court, and that execution may be issued for the enforcement thereof.

Dated and signed August 19th, 1930.

By the Court.

Attest:

Grace Kaercher Davis, Clerk. Grace Kaercher Davis. (Seal.)

[fol. 704] In Supreme Court of Minnesota

[Title omitted]

Præcipe for Transcript of Record—Filed Sept. 5, 1930

To the Clerk of the Supreme Court of Minnesota:

You are hereby respectfully requested to make a full and complete transcript of the entire record and proceedings in this cause to be used in an application to the Supreme Court of the United States for a writ of certiorari to review said cause; such transcript to consist of:

The record on the first appeal therein, numbered 27842.

The opinion of the Supreme Court of Minnesota on the first appeal.

Judgment of the Supreme Court on first appeal.

Mandate of the Supreme Court to the District Court.

Consent to reduction of the verdict by plaintiff.

Stipulation as to costs and entry of judgment in District Court.

Judgment in the District Court.

Notice of appeal from such judgment, and Assignments of Error.

Waiver of appeal bond.

Stipulation re submission of case on record used in first appeal.

Opinion of the Supreme Court of Minnesota on second appeal, numbered 28214.

Petition for stay, and order staying proceedings.
Final judgment of the Supreme Court of Minnesota.
Clerk's certificate to the complete record in said cause on both appeals.
Stipulation as to entry of judgment
Præcipe.
Dated August 30, 1930.

John E. Palmer, James L. Hetland, Fryberger, Fulton & Boyle, Attorneys for Defendant-Appellant.

[File endorsement omitted.]

[fol. 705] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 706] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 8, 1930

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted, the argument and briefs to be limited to the question arising from the failure of the state court to grant a new trial in a case under the Federal Employers' Liability Act where the verdict was obtained by appeals to passion and prejudice.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,465. Minnesota Supreme Court. Term No. 543. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, petitioner, vs. Noah Moquin. Petition for a writ of certiorari and exhibit thereto. Filed November 12, 1930. File No. 35,465.



FILE COPY

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CHARLES ELMORE CR
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 543

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

NOAH MOQUIN, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

HENRY S. MITCHELL,
1427 *First Nat'l-Soo Bldg.,*
Minneapolis, Minnesota,
Counsel for Defendant and Petitioner.

JOHN E. PALMER,
JAMES L. HETLAND,
1427 *First Nat'l-Soo Bldg.,*
Minneapolis, Minnesota,
Of Counsel.

(35,465)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 543

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

NOAH MOQUIN, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully shows that it seeks herein a review by this Court of the final judgment of the Supreme Court of Minnesota, the court of last resort of that State, awarding respondent damages in the sum of $23,870.39, and affirming the judgment of the District Court of Minnesota, Crow Wing County, in his action under the Federal Employers' Liability Act

1d

(35 Stat. 65) to recover for injuries sustained while employed by petitioner as a brakeman in interstate commerce.

Summary Statement of the Matter.

Respondent precariously stood on top of a box car pushed by a locomotive moving backwards along a "house track" where there was ice on the roadbed not high enough to endanger car movements, drifted snow over the top of the rails, and *alleged* ice on the rails at one place. The backward movement was preparatory to a forward "flanging" movement of the locomotive to remove the snow from the rails with small snow plows at the front end of the locomotive. He sustained his injuries in falling from the car when it was derailed in the preliminary backward movement.

(1) The Court excluded petitioner's defense that respondent was on the car unnecessarily in violation of his duty to be on the ground at a highway crossing over which the car was backed, for the purpose of protecting traffic.

(2) The Court instructed the jury that it might find petitioner liable to respondent if it found that the derailment was caused by "snow and ice" making the track unsafe, eliminating the question of fact whether it was caused, as respondent contended, by ice on the rails which was not removable by "flanging," or, as petitioner contended, by packed snow over the rails which was so removable.

(3) The jury was charged that it might find petitioner negligent with respect to the condition of the track, without specifying any necessity of finding that petitioner failed to use ordinary care and prudence in that respect.

(4) The judgment against petitioner was based on a verdict which the Court found was influenced by passion and prejudice.

Reasons Relied on for the Allowance of the Writ.

Petitioner was deprived of the benefit of applicable principles of the common law as interpreted by the Federal Courts in that:

(1) Exclusion of this defense violated the principle that there can be no recovery for injuries sustained through voluntarily electing to exchange a safe for an obviously unsafe place to work.

(2) This instruction permitted the jury to find petitioner liable to respondent even if it found that his injuries were caused by an unsafe condition of snow over the rails in remedying which (through "flanging") he was participating by watching the crossing, in his own way, from the top of the car.

(3) This charge violated the principle that there can be no recovery for negligence in not furnishing a safe place to work, unless based on failure to exercise ordinary care and prudence to have the place in reasonably safe condition for the work to be done.

(4) Allowing judgment to be entered on a verdict corrupted by passion and prejudice was contrary to the principle that judgment may not be based on a verdict thus tainted.

WHEREFORE petitioner, referring to the attached brief in support of its reasons for review, respectfully prays that this Court issue a writ of certiorari directed to the Supreme Court of Minnesota to certify and send to this Court a full and complete transcript of the record herein, to the end that the case may be reviewed and determined by this Court as provided by law, and that the decision of the Supreme Court of Minnesota may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray, etc.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
By HENRY S. MITCHELL,
Counsel for Petitioner.

JOHN E. PALMER,
JAMES L. HETLAND,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION.

Opinions of the Court Below.

There are two opinions of the Minnesota Supreme Court in this case. The first, filed on June 27, 1930, and reproduced at R. 670-678, affirmed the rulings of the trial Court assigned as error on the first appeal, but ordered the damages to be reduced. The second, filed on August 8, 1930, and reproduced at R. 695, affirmed the judgment so reduced and the rulings of the trial Court assigned as error on the second appeal, for the reasons stated in the former opinion. They have not been reported officially.

Jurisdiction.

The judgment to be reviewed was filed in the Supreme Court of Minnesota on August 19, 1930 (R. 698).

The jurisdiction of this Court is invoked on the basis of the following specific claims advanced and rulings made in the lower courts:

(1) Petitioner requested a charge that respondent could not recover if the jury found that he "voluntarily chose an unsafe and dangerous method of doing his work when there was a safe method open to him" (R. 635). It requested the Court to submit to the jury the question whether "it was the duty of plaintiff to

remain on the ground and protect traffic over the crossing" (R. 635). Also to charge that if the jury so found its verdict must be for petitioner (R. 635). The trial Court denied those requests (R. 632). It charged the jury that "this rule (requiring respondent to precede the cars over the crossing) is not to be considered by you for any purpose" (R. 608). Petitioner assigned error as to all those rulings in the Supreme Court of Minnesota (R. 686, 689). That Court affirmed them on the ground that violation of the rule could not have caused the injury (R. 674, 678, 698).

(2) Petitioner excepted to the Court's instructions to the jury "that it was the obligation of the defendant to keep the tracks at Cloverton reasonably free from snow and ice" (R. 624). This included the instruction that the main question was whether petitioner was negligent in that it "permitted ice and snow to accumulate upon this track and so rendered it in an unsafe condition" which made no distinction as to snow removable by flanging (R. 599). In moving to set aside the verdict petitioner quoted those instructions as being erroneous (R. 645, 647); and assigned error in "authorizing" the jury to award respondent damages "by reason of ice and snow" on the track in view of the evidence that he was "participating" in a flanging movement (R. 643). The trial Court denied that motion (R. 667). In the Minnesota Supreme Court petitioner assigned error "in authorizing the jury to grant recovery to plaintiff for injuries caused by defective conditions which plaintiff and the other members of his train crew were engaged in remedying" (R. 690).

That Court held that an instruction "that an employee cannot recover damages for injury caused by the defect which his work required him to repair" would have been proper, but that failure to give it was not error because it was not requested (R. 675, 676). It did not mention the point that the instruction actually given and excepted to affirmatively authorized recovery for an injury so caused.

(3) Petitioner excepted to the charge that "it was the obligation of the defendant to keep the tracks at Cloverton reasonably free from snow and ice," wherein the standard of ordinary care and prudence was not mentioned (R. 624). It assigned error in the Minnesota Supreme Court in not charging the jury that petitioner was bound "to use only ordinary care to provide plaintiff a reasonably safe place in which to work" (R. 688). That Court held that petitioner "was bound to exercise ordinary care only to keep the house track in a reasonably safe condition for service" (R. 674). But it approved the charge on the ground that "the instructions taken as a whole did not lead the jury to believe that defendant was an insurer of the safety of the place to work" (R. 674, 678, 698).

(4) Petitioner moved the trial Court to set aside the verdict because it was "deprived of a fair trial" by misconduct of respondent's counsel in making to the jury appeals to passion and prejudice which were specified in the motion (R. 642, 657-666). The Court denied that motion (R. 667). On appeal to the Minnesota Supreme Court petitioner assigned error in enter-

ing judgment upon and refusing to set aside the verdict because of misconduct of respondent's counsel in making "prejudicial, inflammatory and unwarranted" statements to the jury which "deprived defendant of a fair trial and subjected it to findings on all the issues by a jury actuated by passion and prejudice" (R. 688). The Supreme Court declared that "little justification" could be made of parts of the argument of respondent's counsel to the jury; held the verdict excessive "because of passion and prejudice"; and required respondent to consent to its reduction from $27,500 to $22,500 as a condition of its affirmance (R. 676-678, 679). Judgment was then entered in the District Court on the verdict so reduced (R. 683). Petitioner appealed from that judgment assigning error as above (R. 684-692). The judgment was affirmed by final judgment of the Supreme Court (R. 698).

The statutory provision under which the jurisdiction of this Court is invoked is Section 237 of the Judicial Code of the United States as amended by the Act of February 13, 1925, Chapter 229 (43 Stat. 937).

Cases believed to sustain the jurisdiction are:

Ark. Cattle Co. *v.* Mann, 130 U. S. 69.
Seaboard Air Line *v.* Horton, 233 U. S. 492.
Atlantic Coast Line R. R. *v.* Burnette, 239 U. S. 199.
C. M. & St. P. Ry. Co. *v.* Coogan, 271 U. S. 472.
Atlantic Coast Line R. R. Co. *v.* Davis, 279 U. S. 34.
Atlantic Coast Line R. R. Co. *v.* Driggers, 279 U. S. 787.
St. L. & I. M. Ry. Co. *v.* Taylor, 210 U. S. 281.

Statement of the Case.

On the day of his accident, February 27, 1928, respondent was the rear brakeman of a way freight train delivering and collecting freight cars and freight. The locomotive was equipped with "flangers" or small snow plows fitted over the pilot for the purpose of removing snow from rails and adjacent flangeways. As stops were made at various stations snow covered passing tracks and house tracks were "flanged out" by the crew.

Stopping at Cloverton they found an empty box car and a box car loaded with ties standing coupled together, in a loading yard, on a house track over which snow had drifted (R. 33, 219). This track connected with a passing track which connected with the main track.

When the train had stopped at Cloverton the head brakeman uncoupled the locomotive and tender, which then moved forward on the main line, next backwards over the passing track and house track switches, and thus onto the house track toward the two cars standing there coupled together (R. 32, 218, 219).

In the meantime, respondent, the rear brakeman, walked across and climbed on top of the box car loaded with ties for the purpose of releasing the hand brake (R. 33). While he was doing so the engine and tender were backing up to couple onto these cars (R. 34, 36). He saw the head brakeman standing on the footboard of the tender signalling that they were going to shove back along the house track (R. 43, 44).

Respondent explained that after backing to the other end of the house track the engineer would stop, let his "flangers" down, and "flange out" this track, meaning in a forward movement of the locomotive (R. 35). Respondent testified that he had no duty to perform in connection with the "flanging" (R. 42, 43). After that operation was completed, he would have duties to perform on the cars in switching out the load of ties and placing it in the train on the main line (R. 42, 43).

Instead of descending from the car after releasing the hand brake, respondent remained standing on top of it as it was backed over a highway crossing (R. 34). He watched the crossing from the top of the car (R. 35). He was injured in falling to the ground from that position when the car was derailed after passing some distance beyond the crossing (R. 37, 231).

Petitioner's evidence tended to show that the derailment was caused by packed snow over the top of the rails (R. 123, 132, 137, 143, 152, 301, 313, 400). Also that there was no ice except on the roadbed beneath the level of the flangeways in which the flanges of car wheels revolve (R. 124, 138, 155, 162, 163, 304). The snow was about to be cleared from the rails by the flanging operation which petitioner had ordered to remedy the dangerous condition (R. 33, 35, 164, 167, 305, 306, 533, 637).

Respondent's evidence was to the effect that the derailment was caused by ice resting on top of the rails with suggested negligence of the section foreman in not reporting it or having it removed (R. 15, 16, 40, 45, 113, 324, 346, 355, 636, 637).

Assigned Errors Intended to Be Urged.

I.

Error in excluding petitioners defense that respondent's injuries were due to his voluntarily electing to exchange a safe for an unsafe place to work.

II.

Error in authorizing the jury to award damages to respondent for injuries caused by an unsafe condition in remedying which he was engaged.

III.

Error in permitting the jury to find petitioner negligent as to the condition of the track without finding that it failed to exercise ordinary care and prudence in that respect.

IV.

Error in allowing judgment against petitioner to be based on a verdict corrupted by passion and prejudice.

ARGUMENT.

I.

Respondent's injuries were due to his voluntarily electing to exchange a safe for an unsafe place to work.

Respondent testified that it was part of his duty to remain on top of the car to "protect" the Main Street highway crossing, near which the car had been stand-

ing, and over which it was pushed by the locomotive (R. 33, 34, 66). To refute that claim petitioner put in evidence Operating Rule 102, providing that:

> "A member of the train or engine crew will protect highway traffic at crossings by preceding each movement over the crossings and see that all highway traffic has been stopped before signalling the engineman to proceed" (R. 637).

Petitioner's General Superintendent testified that it was respondent's duty to comply with Rule 102 by "standing on the highway crossing to protect both the train and the highway travel * * * until the cars had passed over the highway crossing"; also, in view of the intended return movement, that "he should have stayed on the crossing and protected the movement both ways" (R. 499, 500).

Respondent, in rebuttal, testified that the practice and custom of brakemen in going over crossings in small towns like Cloverton was to do as he did; that he had walked over the crossing on his way to the car and nobody was then approaching; that as he stood on the car he could see 5 or 6 blocks in either direction and no one came across; and that the accident occurred about 150 feet beyond the crossing (R. 529-532).

The trial Court charged the jury that "this Rule (No. 102) is not to be considered by you for any purpose" (R. 608).

The Minnesota Supreme Court sustained the trial Court, saying "Upon the record it is doubtful if plaintiff had violated this rule (No. 102), but, if so, such

violation had no causal connection with the injury" (R. 674).

True, if respondent were found to have violated Rule 102 in remaining on top of the car that would not have caused the derailment. But it would establish that petitioner offered him a safe place to do his work of "protecting" the crossing on the solid ground of the highway, and that he voluntarily chose instead to stand on top of a box car being pushed through drifted snow, in a place of obvious danger.

Danger of derailment was obvious. The rails could not be seen where they were covered with snow. It was a place where pulpwood was loaded into cars (R. 341, 342). Pieces of wood or stones might be on the rails, under the snow (R. 190, 191). So too, various kinds of other debris. Also ice, to say nothing of the snow itself in varying and unknown degrees of solidity underneath its surface.

Respondent testified that the snow on this track was 8 to 10 inches high in places (R. 35, 36). He knew the track was about to be "flanged out" (R. 33, 35). In his opinion it needed "flanging" (R. 533). He explained the purpose of "flanging" as being "so the flange of the car won't come in contact with ice or snow and be derailed" (R. 20). Yet he elected to stand on top of a car pushed along this track before it was "flanged out," when the flanges of the wheels inevitably came in contact with ice or snow, with danger of derailment. He did not even protect himself by sitting down so that he could hold on if the derailment came (R. 231, 530).

Atlantic Coast Line *v.* Davis, 279 U. S. 34, 39, held that a railway employee could not recover under this Act because

> "He voluntarily abandoned the safe position on the running board which he at first assumed and placed himself in a position of extreme danger on the 'jack-arm' * * *"

Atlantic Coast Line Ry. Co. *v.* Driggers, 279 U. S. 787, 791, held that a switchman, killed by alleged negligence of his employing Company when he dismounted from a switch engine, could not recover under this Act because he

> "had no duty which required him to dismount from the switch engine at that time, but was supposed to remain on the engine, although it was optional for him to get off and throw the switch."

II.

Authorizing the jury to award damages to respondent for injuries caused by an unsafe condition which he was engaged in remedying.

The principal issue of fact in the evidence was whether the derailment was caused, as petitioner's witnesses testified, by packed snow over the top of the rails (removable by flanging) with no ice excepting on the roadbed beneath the level of the flangeways, or whether it was caused, as respondent's witnesses testified, by ice extending over the top of the rails (not removable by flanging).

The vital significance of that issue was, of course, that petitioner would not be liable to respondent if the derailment was due to snow removable through flanging and he was engaged in the operation of so removing it, by watching the crossing from the top of the car.

The trial Court not only completely avoided any recognition whatever of this defense in charging the jury, but to all intents and purposes authorized the jury to hold petitioner liable regardless of whether this defense was well founded in point of fact.

It did so by merging together petitioner's claim that the derailment was caused by snow and respondent's claim that it was caused by ice so that the jury would understand that the distinction was of no importance; by indiscriminately referring to "ice and snow" as causing the derailment; and by declaring that the main question was whether petitioner was negligent in that it "permitted ice and snow to accumulate upon this track and so rendered it in an unsafe condition" (R. 599).

Assuming that the conjunction "and" in the phrase "ice and snow" might suffice to imply a finding of ice as well as snow contributing to the derailment, such a finding might be based on the fact that ice beneath the level of the flangeways furnished a solid base enabling the overlying snow to resist and derail the car wheels, which condition could and would be remedied by the flanging operation (R. 155, 306).

Petitioner assigned error in that the above part of the charge affirmatively *imposed* on it a legally nonexistent liability for respondent's injuries, if caused

by snow about to be removed through a flanging operation which he was assisting. Having excepted to this part of the charge, petitioner was entitled to relief against the affirmative error thereof, when duly assigned as such. The Minnesota Supreme Court misapprehended this assignment in dismissing it as a mere complaint that the trial Court failed to give an unrequested instruction *excluding* such liability. *Supra*, Jurisdiction (2).

Non-recovery for injuries caused by a dangerous condition claimant was engaged in remedying is a principle of the common law as interpreted by the Federal Courts. Kansas City Southern Ry. Co. *v.* Billingslea, 116 Fed. 335. Therefore it applies under this Act. C. M. & St. P. Ry. Co. *v.* Coogan, 271 U S. 472, 474.

In authorizing the jury to find petitioner liable for such an injury the Court erroneously construed this Act. In the State Courts petitioner asserted its right not to have the Act so construed. *Supra*, Jurisdiction (2). Therefore this Court has jurisdiction. St. L., I. M. & S. Ry. *v.* Taylor, 210 U. S. 281, 293.

III.

Holding petitioner negligent as to the track's condition with no finding of failure to use ordinary care and prudence to keep it reasonably safe.

The trial Court erroneously charged the jury as to the extent of petitioner's duty to have the track in a safe condition.

That duty is defined in Seaboard Air Line *v.* Horton, 233 U. S. 492, 501, thus:

> "The extent of its (the employer's) duty to its employes is to see that *ordinary care and prudence* are exercised to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen." (Emphasis ours.)

This Court there condemned the following charge from which the standard of ordinary care and prudence was omitted (p. 500):

> "It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work and to furnish him with reasonably safe appliances with which to do his work."

That charge was held sufficient ground for reversing the judgment because it (p. 502):

> "imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care."

The charge was also condemned because (p. 500):

> "In various other forms the notion was expressed that the duty of defendant was absolute with respect to the safety of the place of work and of the appliances for the work."

So too, in various forms the charge in the present case expressed the notion that the duty of petitioner was absolute with respect to the safety of the place of work.

For instance, the following:

> "The main question before you is first whether or not the defendant Railway Company

was negligent in its failure to keep this house track in a safe condition for use by its employees, in that it, as the plaintiff claims, had permitted ice and snow to accumulate upon this track and so rendered it in an unsafe condition, and that the defendant failed to have proper and timely inspection made of the house track in question and that the defendant Railway Company failed to ascertain whether or not such house track was safe for the passage of cars over that house track" (R. 599).

And the following:

"If * * * it is your opinion that the snow and ice remained on the track a sufficient length of time so that defendant by the exercise of ordinary and reasonable care, should and could have known of such condition, if you find that the defendant had actual notice, that is, real knowledge, of such conditions, and had that knowledge a sufficient length of time before the accident to enable it to remove the same, and you further find that, under such circumstances, the defendant should have anticipated that an accident might happen, *then the defendant would be guilty of negligence*" (R. 601). (Emphasis ours.)

True, this passage mentions "the exercise of ordinary and reasonable care." But this referred only to petitioner's duty to have *knowledge* of the condition of the track. It was not carried over so as to apply to the succeeding clause concerning petitioner's duty to *remedy* the dangerous condition. Petitioner's duty to remedy this condition was made to depend solely

on having knowledge of it long enough before the accident to *enable* it to be remedied, if it should have anticipated that "an accident might happen."

Thus the jury would understand that if petitioner knew of the alleged ice and snow early enough to have made it *possible* to clear the rails before the derailment, not having done so would constitute negligence, if it should have anticipated that "an accident might happen," regardless of whether or not ordinary care and prudence were exercised to clear the rails.

The harm of that erroneous specific instruction was not cured by the general statement at another place in the charge, after other matters had been discussed, that "Negligence is the failure of a person to use that degree of care that an ordinarily prudent person would use and exercise under the same or similar circumstances" (R. 602). Adskim *v.* Oregon & Washington Navigation Co., 276 Pac. 1094, 1098.

Not only was this reference to the care of an "ordinarily prudent person" wholly disconnected from the previous erroneous instruction, but it was given to the jury as a mere generality, an abstract statement of the test of negligence, without any instruction that it was to be applied by the jurors. They would naturally understand that the Court had given that general standard a proper concrete application to this case in its former absolute instruction that petitioner would be negligent in the circumstances there specified.

The qualification that petitioner would be negligent in case it "should have anticipated that an accident *might* happen" (emphasis ours) was in itself erro-

neous. "An accident might happen" in a place safe by all ordinary standards. Precautions must be taken only against such accidents as the usual and common experience of mankind shows are *likely* to happen, as the Supreme Court of Minnesota admitted, but without granting any relief for this manifest error (R. 674).

IV.

Basing the judgment on a verdict corrupted by passion and prejudice.

In N. Y. C. Ry. Co. *v.* Johnson, 279 U. S. 310, 318, judgment for an injured passenger against a railroad company was reversed because counsel's argument to the jury "so plainly tended to excite prejudice as to be ground for reversal." The Court based that decision on the "paramount consideration" that the state is concerned that litigation be "fairly and impartially conducted." It was held to be the duty of the Court on its own motion to "protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion and prejudice."

Enforcement of that principle by this Court would seem particularly appropriate in order to secure uniformity in cases under the Federal Employers' Liability Act. Otherwise judicious advice to a plaintiff to sue in a state whose courts are tolerant of appeals to passion and prejudice may enable him to procure a recovery under that Act which he could not secure in other courts.

We therefore refer to the following efforts of respondent's counsel in this case to procure a verdict

by inflaming the jury with prejudice against railroad corporations, class prejudice of the poor against the wealthy, and special prejudice against petitioner's counsel as craftily concocting a dishonest defense in order to pauperize a poor man.

In addressing the jury respondent's counsel represented railroad companies generally as trying to fasten on injured men fighting for their rights in court "that they are perjurers and liars" (R. 561); referred to "the difficulties of a man single handed fighting a powerful corporation," the "feeling of superiority * * * of men who represent corporations," and the handicaps of a man fighting for "what they call the underdog" (R. 579); described respondent as "giving to this mighty railroad eighteen of the best years of his life" and petitioner as "coming into court to fight that man and send him out of this court-room stamped as a cheat and a fraud" when it "in common decency and common honesty, if they possess it, should pay this man" (R. 580); characterized petitioner's counsel as a "cool, calculating" corporation lawyer (R. 570); stated that in a wide experience respondent's counsel had never seen "as ingenious and dishonest a defense as is put up in this case" (R. 580); intimated that one of petitioner's witnesses did not lie for the reason that its counsel had not had time to "prepare" him for his testimony (R. 567); suggested that a small verdict would "leave this man a pauper and a beggar to go upon the streets" (R. 591); pictured respondent as "dragging himself up to the doors of the factories and workshops of America" in an unsuccessful search

for work (R. 586); and asserted that if the jury returned a verdict for $26,000, meaning no more than that sum, petitioner's counsel would gleefully telegraph the news to headquarters (R. 581).

It is no mere question of misconduct which might or might not have affected petitioner's substantive right to a fair trial. The Minnesota Supreme Court not only declared that "little justification" could be made of parts of the argument, but it expressly found from the entire record that the verdict was rendered by the jury under the actual influence of passion and prejudice against petitioner (R. 676, 678). Tacitly assuming that such passion and prejudice did not affect the jury's findings on the issues of fact as to whether petitioner was under any liability whatever to respondent, but only its finding as to the amount of damages, the Court affirmed the verdict upon condition that respondent accept a reduction of $5,000 (R. 676-678).

Mr. Justice Stone vigorously dissented on the ground that the entire verdict should be set aside. He suggested that petitioner had a right to have a jury "try *all* the issues fairly" (emphasis his) saying:

> "We find in the verdict plain evidence of the influence on the jury of passion and prejudice and in the argument of counsel for plaintiff its probable source. Yet we grant to the aggrieved party but a small portion of the relief such a combination normally demands" (R. 678).

The view of Mr. Justice Stone was in accord with the principle recognized in Arkansas Cattle Co. v.

Mann, 130 U. S. 69, 75, which quoted with approval the following:

> "Where the circumstances clearly indicate that the jury were influenced by prejudice • • • that remedy (remission of part of the damages) cannot be allowed. Where such motives or influences appear to have appeared, *the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding.*" (Emphasis ours.)

Numerous previous Minnesota decisions are in accord with that view. Masteller *v.* G. N. Ry. Co., 100 Minn. 236; Ewing *v.* Stickney, 107 Minn. 217; Roemer *v.* Schmidt Brewing Co., 132 Minn. 399; Flannery *v.* C., M. & St. P. Ry. Co., 158 Minn. 384, all held that it is *mandatory* to set aside such a verdict. In the first of those cases the Supreme Court ordered a new trial unconditionally, saying (p. 238):

> "We are forced to the conclusion that the verdict of $12,500 is not to be accounted for upon any reasonable basis, and that the jury must have been influenced by passion and prejudice. Such being the case, the reduction of the verdict did not serve to take away the influence which entered into the deliberations of the jury."

Craig *v.* Cook, 28 Minn. 232, suggests what has been regarded as a permissible exception to that rule. It holds that reducing the damages may be a sufficient remedy if the Court feels "satisfied that the verdict of the jury is right, and ought to stand, only that it is

excessive in amount" (p. 263). Of course, if the Court finds the evidence such that a verdict for plaintiff ought to be directed or one for defendant set aside, the only debatable question being the amount of the damages, to order a new trial might seem useless, if the damages are properly reduced.

But in the present case the Court did not suggest that the evidence required a verdict for respondent, nor could this be suggested seriously. It merely declared that the jury's verdict "has committed us to plaintiff's version" (R. 673). We inquire how a verdict admittedly influenced by passion and prejudice can possibly "commit" the Court. The result is that there has been no proper finding that respondent's injuries were caused by petitioner's negligence, either by the Court or by the jury.

A question of procedure was incidentally involved. Petitioner's counsel did not object while respondent's counsel was appealing to the passion and prejudice of the jury. The Minnesota Supreme Court commented on the omission, but held it non-essential in granting relief (though wholly inadequate) because passion and prejudice influenced the verdict. Moreover, this Court holds that in cases under this Act it will not "allow substantive rights to be impaired under the name of procedure." Atlantic Coast Line R. R. *v.* Burnette, 239 U. S. 199; Central Vermont Ry. Co. *v.* White, 238 U. S. 507.

That petitioner did not have a fair trial of the issue of its negligence, *vel non*, is no mere matter of procedure not involving substantive right. The Act is

fundamentally perverted when deliberately stimulated passion and prejudice against a railroad are allowed as a substitute for an impartial finding of negligence, without which the Act contemplates no liability whatever.

Respectfully submitted,

HENRY S. MITCHELL,
Counsel for Petitioner.

JOHN E. PALMER,
JAMES L. HETLAND,
Of Counsel.

November 12, 1930.

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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Petitioner,*

vs.

NOAH MOQUIN, *Respondent.*

REPLY BRIEF OF PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Petitioner*,

vs.

NOAH MOQUIN,

Respondent.

REPLY BRIEF OF PETITIONER.

I.

EXCLUDING PETITIONER'S DEFENSE THAT RESPONDENT'S INJURIES WERE DUE TO HIS VOLUNTARILY ELECTING TO EXCHANGE A SAFE FOR AN UNSAFE PLACE TO WORK.

Respondent's brief attempts to justify the Court's exclusion of the rule requiring him to "precede" the movement over the crossing, on the ground that its purpose of protecting traffic was sufficiently satisfied in his previously walking over the crossing on his way to the car and seeing that no traffic was approaching. That is to say that the rule *permitted* respondent to perform his duty of protecting the crossing from on top of the car.

Even according to that interpretation, the rule was at least evidence that respondent could properly have discharged his duty from a safe position on the ground at the

crossing, and that his remaining on the car was wholly *unnecessary*. It would thus tend to support a finding, either by the Court as a matter of law, or at least by the jury as a matter of fact, that respondent's injuries were due to his unnecessary election to be in a place of *obvious* danger, on a car backed through drifted snow, in a loading yard, where debris was scattered, oblivious to the peril of derailment. It was entitled to consideration on that ground, instead of rejection on the irrelevant ground that its violation did not cause the derailment.

Moreover, the defense referred to was entitled to consideration entirely apart from this rule.

II.

AUTHORIZING THE JURY TO AWARD DAMAGES TO RESPONDENT FOR INJURIES CAUSED BY AN UNSAFE CONDITION IN REMEDYING WHICH HE WAS ENGAGED.

Respondent's brief does not deny that the charge permitted the jury to return a verdict for respondent even if it found that his injuries were caused by snow in removing which, through flanging, he was participating. The brief attempts to justify the charge by asserting that respondent was *not* engaged in a flanging operation, emphasizing the obvious fact that the "flangers" were not functioning during the backward movement and characterizing it as a purely "switching" movement. Petitioner's contention was that respondent was engaged in a flanging operation, in view of the fact that the sole and only purpose of the backward movement in which he was taking part by protecting the crossing was to enable the locomotive to come forward and remove the snow. Respondent's argument overlooks the

point that it was not for counsel to decide as between those conflicting contentions.

Respondent's brief also represents this error in the Court's charge as being of no importance by implying in this connection that ice over the rails *unquestionably* caused the derailment. Elsewhere, however, the brief recognizes that "the main controversy at the trial was the question of whether there *was* ice over the rails" (p. 8). There was ample evidence to support a finding that snow alone caused the derailment.

Our complaint is that the charge permitted the jury to return a verdict for respondent regardless of the above questions, thus imposing on petitioner a liability non-existent in law if they were determined in its favor. That complaint is not disposed of by assertions and assumptions of counsel wrongly implying that no such questions existed.

As for the assertion that there was no contention at the trial that respondent was engaged in making a dangerous place safe, we reply that an exception was taken to that portion of the charge which permitted a verdict for him regardless of the nature of his work (Our Brief, p. 6).

III.

PERMITTING THE JURY TO FIND PETITIONER NEGLIGENT AS TO THE CONDITION OF THE TRACK WITHOUT FINDING THAT IT FAILED TO EXERCISE ORDINARY CARE AND PRUDENCE IN THAT RESPECT.

Seriously misleading is the treatment of this point in respondent's brief. In purporting to quote "the portion of the charge particularly complained of" the brief (pp. 17, 18) suppresses the paragraph which was quoted and particular-

ly complained of at the middle of page 18 of our brief and on the following page. That paragraph was the *very basis* of our complaint that the Court charged the jury that petitioner could be found negligent as to the condition of the track without making such finding contingent on any failure of petitioner to use *ordinary care and prudence* to keep the track in proper condition. By suppressing that paragraph respondent's brief gives color to its incorrect representation of our point as a mere complaint that the word "reasonably" was omitted before the word "safe" elsewhere in the charge.

Respondent's brief then proceeds to represent any inaccuracy in this part of the charge as unimportant, on the ground that it was unquestionable that the track was in a dangerous condition because of "ice and snow." Here the brief perpetuates the confusion between ice and snow as the cause of the derailment. But, in another place (p. 8) it recognizes that the main question at the trial was "whether there *was* ice over the rails." If there was no ice over the rails, and if the derailment was caused by snow about to be removed by "flanging" with proper instruments, then petitioner's negligence would be far from obvious. If the jury had been properly instructed to test petitioner's alleged negligence by the standard of *ordinary care and prudence* it might have found it free from negligence.

IV.

ALLOWING JUDGMENT AGAINST PETITIONER TO BE BASED ON A VERDICT CORRUPTED BY PASSION AND PREJUDICE.

The astonishing assertion in respondent's brief that there was *"nothing prejudicial"* in the argument of counsel emphasizes the need for a writ of certiorari to establish that

the type of "argument" quoted in our brief (p. 21) constitutes an appeal to prejudice which will not be tolerated as a means of securing verdicts under this Act. Respondent's brief emphasizes that the Minnesota Supreme Court declared that the settled practice of objecting and taking exceptions at the trial should not be departed from. But it was not a mere question of objecting to misconduct which might or might not have influenced the verdict.

The Court did not hold that failure to object prevented granting relief where the verdict was *actually influenced* by prejudice. On the contrary, it reduced the damages because it found that this verdict was so influenced. That disproves the assertion in respondent's brief that the matter of prejudice may not be considered in this Court because it could not be raised in the Supreme Court of Minnesota on account of the alleged waiver in not objecting.

Petitioner's complaint is that, because of the passion and prejudice which the Supreme Court found to have influenced the verdict, it never had a fair and impartial trial of the disputed question as to its liability.

Respectfully submitted,

HENRY S. MITCHELL,
Counsel for Petitioner.

JOHN E. PALMER,
JAMES L. HETLAND,
Of Counsel.
December, 1930.

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CHARLES ELMO

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Petitioner,

vs.

NOAH MOQUIN,
Respondent.

PETITIONER'S BRIEF IN OPPOSITION TO THE MOTION TO DISMISS THE WRIT.

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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Petitioner,*

vs.

NOAH MOQUIN, *Respondent.*

PETITIONER'S BRIEF IN OPPOSITION TO THE MOTION TO DISMISS THE WRIT.

This Court limited the review under the writ to the question arising from the failure of the State Court to grant a new trial in a case under the Federal Employers' Liability Act where the verdict was obtained by appeals to passion and prejudice.

(1)

Respondent's motion papers give a wrong impression of this proceeding by asserting (p. 15) that "the Supreme Court of Minnesota had no difficulty in finding the defendant company liable," and that "there is no question but that the defendant is liable in some amount," as if the amount of damages alone were in question.

The State Court gave no indication that it found petitioner liable otherwise than because it was "*committed*" to

respondent's version by the verdict of the jury (R. 673). Respondent's version was that ice over the rails caused the derailment and rendered petitioner liable for respondent's injury.

Respondent's version was not the only one which could be accepted. His brief (p. 8) opposing our petition for certiorari declared that "The main controversy at the trial was over the question of whether there *was* ice over the rails." His present motion papers (p. 6) refer to the fact that "*three disinterested witnesses* testified that there was ice over the rails at the point of derailment and defendant brought in three or four employes to testify that there was *no ice* over the rails."

Thus there was a question whether ice existed over the rails, a negative answer to which would exclude the theory advanced to establish petitioner's liability. The State Court did not indicate any opinion that the evidence required that question to be answered in the affirmative. It was never passed on in any way by the court, but only by the jury which acted under the influence of passion and prejudice deliberately aroused by respondent's counsel.

(2)

Little notice need be taken of counsel's assertions that our petition misrepresented what was said to the jury. Their only attempt to give color to that charge consists in the following distortion of one of the many quotations which the petition (p. 21) made from counsel's improper remarks.

The petition (p. 21) stated that respondent's counsel

> "represented *railroad companies* generally as trying to fasten on *injured men* fighting for their rights in Court that *they* are perjurers and liars." (Italics ours.)

The motion papers (p. 4) assert that in making that statement we

> "would lead the Court to believe that counsel had called *railroad witnesses* perjurers and liars." (Italics ours.)

Such flagrant distortion needs no further comment.

The motion papers (p. 5) undertake to justify counsel's argument to the jury that petitioner was attempting to fasten the charge of perjury on respondent, on the ground that petitioner produced witnesses who testified that there was no ice over the rails when respondent had testified that there was. Every lawyer knows the difference between charging a man with perjury and producing witnesses whose testimony differs from his.

Counsel assert (p. 5) that respondent "could not have been mistaken" as to what he saw. That was for the jury to determine uninfluenced by any false impression that there was a charge of perjury against him which they would be supporting if they did not accept his testimony as conclusive.

Similarly the motion papers (p. 6) attempt to justify counsel's statement to the jury that he had never seen "as ingenious and dishonest a defense as is put up in this case" on the ground that petitioner produced several of its employes who contradicted the testimony of respondent's "three disinterested witnesses" that ice covered the rails. That could not justify characterizing the *defense* as being *ingeniously dishonest*. That charge should be considered in connection with counsel's insinuation to the jury that petitioner's counsel "prepared" the witnesses to give false testimony (Petition, p. 21). None of counsel's charges and insinuations of that character had any foundation. Taken together they were calculated to arouse passion and prejudice

against respondent and its counsel.

The motion papers make no attempt to controvert or justify the many other improper remarks of counsel quoted in our petition which tended to inflame the jury with passion and prejudice.

(3)

Counsel assert (p. 11) that even if "the argument was the most vicious and prejudicial one imaginable" local rules of practice would be applicable. That completely ignores the protection afforded by this Court, in cases under this Act, in refusing to allow "substantive rights to be impaired under the name of procedure."

Atlantic Coast Line R. R. vs. Burnette, 239 U. S. 199.
Central Vermont Ry. Co. vs. White, 238 U. S. 507.

It is our view that obtaining verdicts under this Act by vicious and prejudicial arguments which impair a party's substantive right to a fair determination of its liability would not be tolerated by this Court, even if sanctioned by local rules of practice. Indeed, it may be prohibited by Amendments V and XIV to the Federal Constitution against taking property without due process of law.

Counsel's assertion that the question is "purely one of local practice" (pp. 2, 16) ignores our contention that the *verdict was vitiated* by passion and prejudice of the jury as a result of counsel's efforts to arouse those improper influences.

The practice to which they refer is against ordering a new trial on account of misconduct of counsel *per se* when, as in this case, it was not objected to at the time it occurred. It does not apply where a new trial is sought, as here, on the ground that the *verdict reflects* the misconduct of counsel.

Counsel attach unwarranted significance to the Court's allusion to the absence of immediate objection to their misconduct to "protect the record" according to the "settled practice" (R. 676, 677). In that paragraph of its opinion the Court seemed to assume that error was assigned against counsel's misconduct *per se*, which was not the case.

However, in the concluding paragraph of its opinion the Court reduced the verdict as being excessive because of passion and prejudice (R. 678). In so doing it necessarily held that the "settled practice" which it had previously mentioned was immaterial to granting relief because of passion and prejudice actually reflected in the verdict itself. Since the "settled practice" did not prevent the Court from reducing the verdict on that account, it did not prevent setting it entirely aside for the same reason.

That was recognized in *Hanskett vs. Broughton*, 157 Minn. 83. There too an excessive verdict was obtained by appeals to passion and prejudice which were not objected to at the time, except for denials and retorts (p. 86). The Court pointed out that the misconduct in itself was not assigned as error and "would not have been for consideration" (p. 88). Nevertheless, it ordered a new trial.

The Court explained in denying a petition for re-argument that the order for a new trial was

> "predicated solely upon our conclusion that the verdict seemed excessive and that its size may have been due to misconduct of counsel,"

and that

> "Its seemingly excessive character, coupled with the conduct of counsel, made a *combination* which required a new trial, as the opinion states, in the interest of the proper administration of justice." (Italics ours.)

The existence here of that same *combination*, an award of excessive damages combined with misconduct of counsel in appealing to the jury's passion and prejudice, shows that we are not attempting to overthrow the practice of merely reducing the damages in cases where the size of the verdict *alone* suggests the influence of passion and prejudice.

Where counsel did not appeal to such influences it is possible to assume that the jury first impartially determined the question of liability and that passion and prejudice were not aroused until it subsequently came to decide the amount of damages. But where those emotions were inflamed by counsel before the jury began its deliberations, and are found still in control when it reached the ultimate question of damages, it would be *preposterous* to assume that they were subdued in the interim so as to determine the question of liability fairly and dispassionately.

Thus the applicable "settled practice" of Minnesota was that described in *Arrell vs. Davies*, 171 Minn. 472, as follows:

> "when a verdict is excessive and it is probable that the jury were influenced by passion and prejudice in the determination of other issues, a new trial should be granted."

That principle is also recognized in the Federal Courts. *Arkansas Cattle Co. vs. Mann*, 130 U. S. 69; *Gila Valley Ry. Co. vs. Hall*, 232 U. S. 94. In the latter case this Court approved the following statement (p. 105):

> "if it appears that the verdict is tainted with prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted."

In the present case Mr. Justice Stone of the Minnesota Supreme Court, in holding that the vice in the present ver-

dict was not cured by the Court's reduction of damages, stated that (R. 678):

> "we are refusing defendant the right to trial by another jury which, it is to be presumed, would try *all* the issues fairly. * * * We find in the verdict plain evidence of the influence on the jury of passion and prejudice and in the argument of counsel for plaintiff its probable source. Yet we grant to the aggrieved party but a small part of the relief such a combination normally demands."

CONCLUSION.

Since the State Court found the verdict excessive because of the jury's passion and prejudice, and since the unmistakable source of that passion and prejudice was in counsel's misconduct before the jury began its deliberations, it is manifest that we did not have a fair trial of the question of our liability according to the common law enforced in the Federal Courts and a new trial should be ordered.

We respectfully submit that the motion to dismiss should be denied and request that if the Court sees fit to transfer the case to the summary docket it be set for argument not earlier than April 14th.

HENRY S. MITCHELL,
Counsel for Petitioner.

JOHN E. PALMER,
JAMES L. HETLAND,
Of Counsel.
January, 1931.

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Petitioner,*

vs.

NOAH MOQUIN, *Respondent.*

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PETITIONER.

HENRY S. MITCHELL,
Counsel for Petitioner.

JOHN E. PALMER,
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Supreme Court of the United States

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MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Petitioner,*

vs.

NOAH MOQUIN, *Respondent.*

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PETITIONER.

OPINIONS OF THE COURT BELOW.

There are two opinions of the Minnesota Supreme Court in this case, not yet officially reported. The first, filed on June 27, 1930, is reproduced at R. 464-473. It stated the Court's reasons for affirming the verdict for respondent, on condition of a reduction of damages from $27,500 to $22,500. The second opinion of the Court, filed on August 8, 1930, and reproduced at R. 488, affirmed the judgment entered for the reduced amount, and referred to the former opinion for the Court's reasons for so doing.

JURISDICTION.

The judgment to be reviewed was filed in the Supreme Court of Minnesota on August 19, 1930 (R. 490).

The jurisdiction of this Court is invoked on the basis of the following specific claims advanced and rulings made in the lower courts:

Petitioner moved the District Court to set aside the verdict because it was "deprived of a fair trial" by misconduct of respondent's counsel in making to the jury appeals to passion and prejudice (R. 446, 456-462). The Court entered an order denying that motion (R. 462). Petitioner appealed to the Supreme Court of Minnesota which declared that "little justification" could be made of parts of the argument of respondent's counsel to the jury; held the verdict excessive "because of passion and prejudice"; and affirmed it upon condition that respondent consent to its reduction from $27,500 to $22,500 (R. 471-473). Respondent having so consented, judgment was entered in the District Court on the verdict so reduced (R. 475, 477). Petitioner appealed to the Minnesota Supreme Court from that judgment, assigning error in the Court's refusal to set aside the verdict because of misconduct of respondent's counsel in making "prejudicial, inflammatory and unwarranted" statements to the jury which "deprived defendant of a fair trial and subjected it to findings on all the issues by a jury actuated by passion and prejudice" (R. 478, 479, 481). That judgment was affirmed by the final judgment of the Supreme Court here to be reviewed (R. 488).

The statutory provision under which the jurisdiction of this Court is invoked is Section 237 of the Judicial Code of the United States as amended by the Act of February 13, 1925, Chapter 229 (43 Stat. 937).

Cases believed to sustain the jurisdiction are:

Ark. Cattle Co. vs. Mann, 130 U. S. 69.

Seaboard Air Line vs. Horton, 233 U. S. 492.

Atlantic Coast Line R. R. vs. Burnette, 239 U. S. 199.

C. M. & St. P. Ry. Co. vs. Coogan, 271 U. S. 472.

Atlantic Coast Line R. R. Co. vs. Davis, 279 U. S. 34.

Atlantic Coast Line R. R. Co. vs. Driggers, 279 U. S. 787.

St. L. & I. M. Ry. Co. vs. Taylor, 210 U. S. 281.

Jordan vs. Mass, 225 U. S. 167, 176.

STATEMENT OF THE CASE.

Respondent sued petitioner under the Federal Employers' Liability Act (35 Stat. 65) in the District Court of Minnesota, Crow Wing County, to recover damages for injuries sustained by respondent, on February 27, 1928, at Cloverton, Minnesota, while employed by petitioner as a brakeman in interstate commerce.

Respondent sustained his injuries in falling from the top of a box car, when it was derailed in the snow, as it was pushed by a locomotive along a house track, preparatory to a "flanging" movement of the locomotive to clear the snow from the track (R. 23-26, 154).

Petitioner's liability for the accident was predicated on the alleged existence of ice on the rails under the snow (R. 2, 9, 10). There was a sharp conflict in the evidence as to the existence of ice causing the accident (R. 11, 28, 29, 32, 80, 225, 241, 246, 441, 442, 86, 87, 96, 97, 101, 107, 109, 114, 115, 209, 211). Thus there was a fundamental question of fact for the jury on which petitioner's liability depended, as well as other questions of fact which need not be specified.

After the close of the evidence respondent's counsel made

a highly inflammatory speech to the jury, replete with improper appeals to passion and prejudice, of which the following may be mentioned.

Counsel represented railroad companies in general as trying to fasten on an injured man fighting for his rights in court the stigma "that he was a perjurer and a liar" (R. 392). He spoke of "the difficulties of a man, single-handed, fighting a powerful corporation"; the "feeling of superiority * * * of men who represent corporations"; and the handicaps of a man fighting in behalf of "what they call the under dog" (R. 403). He described respondent as "giving to this mighty railroad eighteen of the best years of his life" and characterized petitioner as "coming into court to fight that man and send him out of this court room stamped as a cheat and a fraud" when it "in common decency and common honesty, if they possess it, should pay this man" (R. 404).

He described petitioner's counsel as a "cool, calculating" corporation lawyer (R. 397). He stated that in a wide experience he had "never seen as ingenious and dishonest a defense as is put up in this case" (R. 404). He insinuated that *one* of petitioner's witnesses did not lie for the reason that petitioner's counsel had not had time to "prepare" that witness for his testimony (R. 395).

He suggested that a small verdict would "leave this man a pauper and a begger to go upon the streets" (R. 411). He pictured respondent as "dragging himself up to the doors of the factories and the work shops of America" in an unsuccessful search for work (R. 408). He asserted that if the jury returned a verdict for $26,000, petitioner's counsel would gleefully telegraph the news to headquarters (R. 405).

After the jury had returned a verdict for $27,500 in favor

of respondent, petitioner on motion for a new trial and successive appeals to the Supreme Court of Minnesota duly contended for a new trial on the ground that it had been deprived of a fair trial through passion and prejudice injected into the verdict by respondent's counsel. See above under "Jurisdiction." As there explained, the Supreme Court of Minnesota required petitioner to submit to a judgment of $22,500 based on the jury's verdict, although it criticised the speech in which counsel had appealed to passion and prejudice, and expressly found that the verdict had been rendered under the influence of such hostile emotions (R. 473).

ASSIGNED ERROR INTENDED TO BE URGED.

The error intended to be urged was thus assigned in the Supreme Court of Minnesota:

> "The court erred in refusing to set aside the verdict and grant defendant a new trial on the ground of misconduct of plaintiff's counsel in making highly prejudicial, inflammatory and unwarranted statements to the jury in his closing argument, which conduct deprived defendant of a fair trial and subjected it to findings on all the issues by a jury actuated by passion and prejudice" (R. 481, 482).

It was thus assigned in the petition for certiorari (p. 4):

> "Allowing judgment to be entered on a verdict corrupted by passion and prejudice was contrary to the principle that judgment may not be based on a verdict thus tainted."

ARGUMENT.

The Principle Here Contended For.

Petitioner contends that, although a "remittitur" affirming a verdict upon condition of a reduction in its amount may be recognized as proper where nothing but the amount is subject to criticism, that is not a proper remedy and a new trial must be ordered if it is established that the verdict was actually rendered under the influence of passion and prejudice deliberately injected by counsel improperly appealing to such influences.

The possible qualification of that principle as not obtaining where the evidence is such that a verdict must be directed in favor of the party who obtained it, is wholly inapplicable here because the evidence as to the facts on which petitioner's liability was asserted made a question for the jury as to their existence, and the Court did not hold that the evidence required a verdict for respondent.

Mr. Justice Stone vigorously dissented from the decision merely to order a remittitur, on the ground that the entire verdict should be set aside. He said:

> "We find in the verdict plain evidence of the influence on the jury of passion and prejudice and in the argument of counsel for plaintiff its probable source. Yet we grant to the aggrieved party but a small portion of the relief such a *combination* normally demands" (R. 473). (Italics ours.)

Previous Recognition of This Principle in Minnesota.

Mr. Justice Stone was obviously referring to the Court's previous recognition in *Hanskett vs. Broughton*, 157 Minn. 83, of the principle for which we contend. There the Court

ordered a new trial because the verdict was obtained by appeals of counsel (not formally objected to at the time) to the passion and prejudice of the jury. It explained that the order for a new trial was (p. 88)

> "predicated solely upon our conclusion that the verdict seemed excessive and that its size may have been due to misconduct of counsel,"

and that

> "Its seemingly excessive character, coupled with the conduct of counsel, made a *combination* which required a new trial, as the opinion states, in the interest of the proper administration of justice." (Italics ours.)

That decision was in accord with the same Court's previous recognition of the same principle in *Petruschke vs. Kamerer,* 131 Minn. 320. There the Court ordered a new trial because of an excessive verdict rendered under the influence of passion and prejudice instilled by counsel in his address to the jury, saying (pp. 324-327):

> "One ground assigned for a new trial in the Court below was excessive damages given under the influence of passion and prejudice. The same ground is assigned here. We take it that under this assignment the whole record may be examined for matters inducing passion and prejudice affecting the size of the verdict, even though such matters crept in at times when appellant's counsel failed to object. * * * It is impossible to read this record without coming to the conclusion that there was instilled into the minds of the jury an undue amount of passion and prejudice. * * * Fair trial, without passion and without prejudice, * * * is due every litigant, sinner as well as saint, in a court of justice. * * * We conclude that the exception to an

excessive verdict, rendered by the jury under the influence of passion and prejudice, must be sustained; and a new trial should be had."

Incidentally, the Court in that case clearly recognized the important distinction between misconduct of counsel *per se* and such misconduct as actually reflected in an improper verdict. There a new trial was applied for (131 Minn. 323) because of "misconduct of plaintiff's counsel in his argument to the jury" and because the verdict was "excessive and appears to have been given under the influence of passion and prejudice." Referring to the first of those grounds, misconduct *per se*, the Court noted that the trial court had not been asked to interfere, and expressly declined (p. 323) to order a new trial on that ground. It proceeded, however, as noted above, to order a new trial because of the misconduct as actually reflected in an improper verdict.

The same Court in *Morner vs. Kohen*, 172 Minn. 543, 547, ordered a new trial and reversed an order which merely reduced the damages, saying:

"The conduct of plaintiff's attorney tended to incite prejudice, and the grossly excessive verdict indicates that the jury must have been influenced by prejudice. And the prejudice reflected in the verdict may have affected the determination of the other issues presented. At least we are unable to say it did not."

The same Court declared in *Arrell vs. Davies*, 171 Minn. 472, 474, that:

"It has been held that when a verdict is excessive and it is probable that the jury were influenced by passion and prejudice in the determination of other issues, a new trial should be granted; but, where the only complaint is that the verdict is excessive, it is within the

discretion of the trial court to deny a new trial on condition that the prevailing party submit to a reduction."

Thus the principle we contend for was well established in previous Minnesota practice unaccountably departed from in the present instance.

RECOGNITION OF THIS PRINCIPLE IN OTHER STATES.

The Supreme Court of Michigan in ordering a new trial for appeals of counsel to passion and prejudice in *Cluett vs. Rosenthal,* 100 Mich. 193, 200, declared:

> "* * * where the language is such as evinces a studied purpose to arouse the prejudice of the jury, based upon facts not in the case, we cannot overlook it, or consider that a party against whom such effort has been made has had a fair consideration of his case at the hands of the jury."

In *Appel vs. Chicago City Ry. Co.,* 259 Ill. 561, the Court declared:

> "misconduct of counsel not objected to cannot be made the ground of reversal. * * * The question still remains whether the defeated party, in view of the whole record, has had a fair trial. * * * If the argument prejudiced the jury against the defendant, that prejudice was as likely to affect their judgment in regard to the defendant's liability as in regard to the amount of the liability."

In *Houston & T. C. R. Co. vs. Rehm,* 36 Tex. Civ. App. 553, the Court ordered a new trial because of appeals by plaintiff's counsel to the passion and prejudice of the jury, not objected to at the time, saying:

"We think it well settled that when counsel in their address to the jury intentionally go outside of the record and indulge in remarks that are clearly prejudicial to the rights of the opposing side, and must have been made for the purpose of influencing the jury, such conduct not only authorizes, but requires, the trial court to set aside the verdict of the jury, notwithstanding the remarks were not objected to at the time they were made. * * *

"The prejudicial effect of these remarks is reflected in the size of the verdict rendered, which we think is much larger than the facts warrant. If this were the only effect produced by the violation by appellee's counsel of the rule requiring the argument to be confined to the evidence, we might remedy the wrong by requiring a remittitur, but, as before stated, the evidence is not conclusive upon either the issue of negligence on the part of appellant nor that of contributory negligence, and we cannot say that these improper remarks did not influence the jury in the determination of these issues."

In *Wabash R. R. Co. vs. Mahoney*, 79 Ill. App. 53, 58, the Court said:

"If the court was of the opinion, as it stated at the hearing on the motion for a new trial that for the alleged improper remarks of plaintiff's counsel to the jury said verdict should be reduced $400, then a new trial should have been granted, for it seems impossible that the learned trial judge could have determined to what extent the verdict was induced by counsel's remarks."

RECOGNITION OF THIS PRINCIPLE IN FEDERAL COURTS.

In *Arkansas Cattle Co. vs. Mann*, 130 U. S. 69, 75, this Court quoted with approval the following statement from *Stafford vs. Pawtucket Haircloth Co.*, 2 Cliff. 82:

> "where the circumstances clearly indicate that the jury were influenced by prejudice * * * that remedy (remission of part of the damages) cannot be allowed. Where such motives or influences appear to have operated, the verdict must be rejected, because the effect is to cast suspicion upon the conduct of the jury and their entire finding."

Again in *Gila Valley Ry. vs. Hall*, 232 U. S. 94, 104, 105, this Court approved the lower court's adoption of the rule thus stated:

> "if it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside. In passing upon this question the court should not look alone to the amount of the damages awarded, but to the whole case."

The underlying reason for the rule was thus explained in *Preston vs. Mutual Life Ins. Co.*, 71 Fed. 467:

> "it is plain and unquestionable that a verdict in favor of a party whose conduct was calculated to improperly influence the jury upon a material question should be set aside, and a new trial granted, on the ground of public policy. * * * The duty of the court to see that a trial is fair, and that all material questions are fairly presented, is imperative, and the duty to regulate the proper conduct of a trial may be discharged either with or without motion."

Constitutional Requirements That This Principle Be Recognized.

The Minnesota Supreme Court explained in *Smith vs. Great Northern Ry. Co.*, 133 Minn. 192, that in such cases

> "A new trial is not granted because it discourages misconduct. It is granted because the conduct of counsel interferes with the administration of justice to the substantial prejudice of the rights of a litigant."

That constitutional provisions safeguarding "trial by jury" are thus drawn in question was indicated in *Lomen vs. Minneapolis Gaslight Co.*, 65 Minn. 196, per Mitchell, J., as follows (p. 209):

> "The expression 'trial by jury' is as old as Magna Charta and has obtained a definite historical meaning which is well understood by all English speaking peoples; and, for that reason, no American constitution has ever assumed to define it. We are therefore relegated to the history of the common law to ascertain its meaning. The essential and substantive attributes or elements of jury trial are and always have been number, *impartiality* and unanimity." (Italics ours.)

In the same case Canty, J., declared (p. 219):

> "It is conceded by all parties to this case that impartiality is one of the constitutional requirements of a legal jury."

The Federal Constitution contains a provision in Article XIV "nor shall any State deprive any person of life, liberty, or property, without due process of law" and a similar provision in Article V applicable to the Federal Government.

In *ex parte Nelson*, 251 Mo. 63, the Supreme Court of Missouri declared that

"These constitutional provisions are but different modes of expressing the fundamental right of man to a fair and impartial trial, be he innocent or guilty."

This Court declared in *Jordan vs. Massachusetts*, 225 U. S. 167, 176, that

"Due process implies a tribunal both impartial and mentally competent to afford a hearing."

See also *Moore vs. Dempsey*, 261 U. S. 86.
Frank vs. Mangum, 237 U. S. 309.

That there was no impartial trial in the present case is established by the express finding of the Minnesota Supreme Court that the jury acted under the influence of passion and prejudice (R. 473).

Public Policy Requires That This Principle Be Uniformly Enforced in Cases Under This Act.

How would the public interest be affected by a decision of this Court that a State Court is free to decide for itself, in cases under this Act, whether to follow the established practice of setting aside a verdict obtained by appeals to passion and prejudice?

Departures from the established practice of setting aside verdicts so obtained will, if permitted, be a further inducement to personal injury attorneys who rely on obtaining verdicts in that manner, to import cases under this Act into a jurisdiction where such verdicts are allowed to stand.

The obvious truth of that assertion is not affected by the circumstance that the present case was not an imported one. A decision recognizing authority in the State Court to depart from the established practice in the present instance would necessarily mean that it may likewise depart

from that practice in all cases under this Act, wherever they come from.

If it is also a fact established by previous judicial opinions that the manipulating of such importations now constitutes a well defined abuse of the legal profession, definitely characterized by improper and illegal practices demoralizing to the administration of justice, it necessarily follows that a decision in this case tending to the further development of that abuse would be against the public interest.

It thus becomes important to consider in some detail the authorities showing how such importations are conducted.

The wholesale importation of such suits from state to state constitutes a gross perversion of the purpose of the 1910 amendment to the Act, which permits suits under it to be tried in any state where the defendant does business. 36 Stat. 291.

The purpose of that amendment was, according to the Senate Judiciary Committee, to do away with the disadvantage to the plaintiff of being required (*Macon Grocery Co. vs. A. C. L. Ry.*, 215 U. S. 501, 509) to sue the defendant corporation in the jurisdiction where its charter was issued. The committee declared (Senate Report No. 432, in Vol. 2, Serial No. 5583, 61st Congress, 2d Session):

> "This amendment is necessary in order to avoid great inconvenience to suitors and to make it unnecessary for an injured plaintiff to proceed only in the jurisdiction in which the defendant corporation is an 'inhabitant.' This is held by the courts to be the jurisdiction in which the charter of the defendant corporation was issued. This may be at a place in a distant state from the home of the plaintiff, and may be a thousand miles or more from the place where the injury was occasioned. The extreme difficulty, if not impossibility, of a poor

> man who is injured while in railroad employ, securing the attendance of the necessary witnesses at such a distant point makes the remedy given by the law of little avail under such circumstances."

The amendment, thus recommended in order to enable plaintiffs to have their cases tried *in* the jurisdictions where they reside or were injured, has been flagrantly perverted by lawyers specializing in such cases to the precisely *opposite* purpose of trying them in jurisdictions far *removed* from the place of plaintiff's residence or injury.

The astonishing extent of that abuse as practiced in Minnesota was noticed in *Davis vs. Farmers' Co-operative Co.*, 262 U. S. 312, 316, where the Court referred to the fact that

> "a recent examination of the calendars of the District Courts in sixty-seven of the eighty-seven counties of the state disclosed that in those counties there were then pending 1,028 personal injury cases in which nonresident plaintiffs seek damages aggregating nearly $26,000,000 from foreign railroad corporations which do not operate any line within Minnesota."

The heavy expense and disruption of service thus created for the railroads was emphasized by the Court in these words:

> "that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employes from their customary occupation; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers; these are matters of common knowledge" (p. 315).

The Court sustained as reasonable, in *Alabama, etc., Ry. Co. vs. Journey*, 257 U. S. 111, an order of the Director Gen-

eral requiring such suits to be brought in the county or district where the cause of action arose or plaintiff resided, which order was based on these significant recitals (257 U. S. 113):

> "it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains * * * are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more; which practice * * * seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs."

Of those recitals the Court said in the Davis case (262 U. S. 312, 316):

> "The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war."

One way in which the public interest is affected was thus explained in the Davis case (262 U. S. 317):

> "The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act, 1920, which authorizes rate increases necessary to insure to carriers efficiently operated a fair return on property devoted to the public use. Avoidance of waste, in interstate transporta-

tion, as well as maintenance of service, has become a direct concern of the public."

The decision in that case put an end to the importation into a particular jurisdiction of cases against railroad companies which do not operate, but only maintain soliciting agents, in that jurisdiction. It did not, however, terminate the importation of cases against railroad companies actually operating in the jurisdiction to which the cases are imported.

Such importations are as much opposed to the public interest as those stopped by the Davis case. For example, *Weinard vs. C. M. & St. P. Ry. Co.*, 298 Fed. 977, was sued in the U. S. District Court for Minnesota in behalf of an employe injured in the railroad company's shops at Tacoma, Washington, where he resided. That railroad operates in Minnesota as well as Washington. The Court declared:

"The proofs submitted by the defendant show that it would be required to bring a large number of witnesses to Minneapolis from Tacoma, involving a round trip of 3,574 miles, at great expense, depleting, to the extent of the number of witnesses so taken from their work, the shop force of the defendant at Tacoma, and would increase very materially the expense of the trial over what would be incurred if the case were tried where it arose, at Tacoma, Washington. * * *

"The showing is also made that * * * personal injury cases against interstate carriers are brought by hundreds from great distances and from all parts of the United States, and commenced in the courts of Minnesota, and that the combined and cumulative effect of that practice * * * is to underman the shop forces and train crews of interstate railroads, and to enormous-

ly increase the operating expenses of such interstate carriers, which expense must be met by increased rates on interstate traffic, and which, in turn, affects the general public making use of the facilities of such carriers."

The opinion even disclosed that:

"train movements have had to be cancelled and annulled on account of the absence of the necessary employes to operate the same while said witnesses were away from their homes attending trials in the State of Minnesota."

The enormous scope of the abuse was indicated by showing that in a period of four years there were imported into Minnesota against the C. M. & St. P. R. R. Co. *alone* 224 personal injury suits claiming $9,000,000 damages for plaintiffs injured and residing in Washington, Idaho, Montana, North Dakota, South Dakota, Wisconsin, Illinois, Michigan, Indiana and Iowa. (298 Fed. 982.)

The right of a State to decline to entertain such cases, against a railroad doing business in the State because of plaintiff's residence in another jurisdiction was recognized in *Douglas vs. New York, New Haven and Hartford R. Co.*, 279 U. S. 377. There the Supreme Court of New York sustained a dismissal of a suit under this Act by a plaintiff injured and residing in Connecticut against a railroad doing business in New York State. A New York Statute was construed as authorizing the Court to entertain or dismiss at its option such a suit brought by a non-resident plaintiff. This Court held that such a dismissal on the basis of residence did not infringe the provision in the Federal Constitution against discrimination by State Courts on the basis of citizenship; also that the Federal Employers' Liability Act (p. 387)

"does not purport to require State courts to entertain suits arising under it but only to empower them to do so, so far as the authority of the United States is concerned."

However, a majority of the Supreme Court of Minnesota holds that the above case is not adequate authority for the Minnesota courts to decline to try imported cases under this Act. It declared in *Boright vs. C. R. I. & P. R. Co.*, 180 Minn. 52 (with a sound dissenting opinion by Mr. Justice Stone), that (p. 60)

"to refuse jurisdiction, the Constitution aside, would result in a complete change of the local (Minnesota) law—a change which we do not wish to make."

The securing and trying of such cases is chiefly concentrated in the hands of a small class of personal injury attorneys who have developed into a highly specialized offshoot of the legal profession, with headquarters at Minneapolis, definitely characterized by certain notorious practices in flagrant violation of respectable professional opinion, judicial pronouncements, common law prohibitions, and statutory enactments directed against them.

One of their practices consists in violating the laws and mandates of other States against importuning persons who reside, were injured and could sue the defendant in those States, to authorize the bringing of suits in their names elsewhere.

C. B. & Q. R. Co. vs. Tom Davis, et al., 111 Neb. 737, was a suit to enjoin those attorneys from violating the Nebraska Statute, Sec. 9737, Comp. St. 1922, providing a fine or jail sentence for contravention of its provision against soliciting cases in that State to be sued in other States, reading as follows (p. 740):

"That it shall be unlawful for any person, with the intent or for the purpose of instituting a suit thereon outside of this state, to seek or solicit the business of collecting any claim for damages for personal injury sustained within this state, or for death resulting therefrom, or in any way to promote the prosecution of a suit brought outside of this state for such damages, or do any act or thing in furtherance thereof, in cases where such right of action rests in a resident of this state, or his legal representative, and is against a person, copartnership or corporation subject to personal service within this state."

One of the contentions urged by those attorneys was that the remedy for violation of the statute should be by criminal prosecution, not by injunction; but the Nebraska Supreme Court held that the injunction issued by the Court below restraining them from further violating the Statute, was a proper remedy. It explained that the Statute did not attempt to abridge the right of an injured person to bring an action in any jurisdiction he might choose, and that it was solely directed against the personal injury attorneys, saying (p. 741):

"It was a matter of common knowledge that a few attorneys outside of the state, through themselves and agents, were engaged in the practice of soliciting claims for settlement or suit in personal injury actions, and also in cases where the injury resulted in death, with the avowed purpose of bringing actions thereon in some foreign jurisdiction, notwithstanding the fact that both of the parties to the controversy resided in the state. A condition existed where agents of these attorneys were traveling in the state soliciting employment for

non-resident attorneys, haunting the homes of the injured and bringing great discredit to the legitimate practice of the law. It was to curtail this species of 'ambulance chasing' which prompted the Legislature to enact the statute in question. * * * The act was intended as a regulatory measure to curtail the conduct of a class of attorneys who were guilty of infractions of long-established ethical precepts of the profession."

Moad vs. Illinois Central R. R. Co., was an action brought by those same attorneys in the Minnesota District Court, Tenth Judicial District, on account of injuries sustained by plaintiff in Iowa, while an employe of the railroad company. They petitioned the District Court to allow an attorney's lien for services rendered to plaintiff in that action. The Court made Findings of Fact, dated June 26, 1923, on file in the office of the Clerk of that Court at Albert Lea, Minnesota.

The Court found that plaintiff resided, was injured and was being cared for at the Company's expense in a hospital, in Iowa. That he was called upon in the hospital by a regular soliciting agent of those attorneys, for the purpose of inducing him to place his case in their hands to bring suit in Minnesota. That he then declined, stating that he wished first to attempt a direct settlement with the railroad company. That the above and another regular soliciting agent of those attorneys repeatedly thereafter called upon him in the hospital and persistently importuned him to do as requested, representing that those attorneys would pay all of his expenses, railroad fare, hotel bills, and doctor bills, to and at Minneapolis, and all the expenses of the litigation. That he finally yielded to those importunities, was met by said Davis at the train at Minneapolis, was assured by him

that the agreement made by the soliciting agents would be carried out, was lodged at the attorneys' expense at a hotel in Minneapolis, and executed with them a contract that they should prosecute his claim and receive one-third of the net proceeds.

The Court denied the attorneys' application for a lien, declaring that

> "The aforesaid solicitation of said business was and is contrary to the laws of the State of Iowa and contrary to the laws of the State of Minnesota,"

and that

> "to support and sanction such transactions would be a reproach to the legal profession and the courts of this state."

C. M. & St. P. R. Co. vs. McGinley, 175 Wis. 565, was a case in which those same attorneys appeared in opposition to an injunction, which the lower Wisconsin court granted, restraining McGinley from suing the railway company in the State of Minnesota on account of an injury sustained by him as its employe in Wisconsin where he resided. One of the grounds on which the injunction was sought was that the attorneys were guilty of procuring control of the case by improper methods and that it was (p. 579).

> "not being prosecuted in Minnesota in good faith but from ulterior motives, primarily designed to promote the business of such counsel engaged in such reprehensible practice."

In dismissing the injunction, as being beyond the power of the Wisconsin court, the Supreme Court of that State made the following comments on the practices referred to (579):

> "That such practices have been indulged in extensively by counsel, both in the state of Wisconsin and in

the state of Minnesota, is a matter well known to the profession and to the courts. We are also aware that in both states these practices have been emphatically denounced by the state and local bar associations. It is a practice that tends to lower the ethical standard of the profession of the law and has contributed in a large measure to the disrespect which exists among the public with respect to the profession. The practice of the law is an ancient and honored profession, and we number among its followers at all times some of the ablest, most distinguished, and honored citizens of our country. This offensive solicitation of legal business has a tendency to commercialize the business of the profession, to degrade it, and to lower its standard. The practice of it is in violation of the oath that every attorney is required to take, and no reputable attorney in this state or elsewhere will resort to it."

C. M. St. P. & P. R. Co. vs. Wolfe and Hoch, 199 Wis. 278, involved another firm of Minneapolis personal injury lawyers. There an injunction had been issued by the lower Wisconsin court to restrain the prosecution of actions in Minnesota by Wolfe and Hoch who were residents of Wisconsin. It was alleged that Hoch was a locomotive fireman residing in Milwaukee, Wisconsin, where the accident occurred and all the witnesses resided; and similar allegations were made concerning the case of Wolfe. Here again, the Supreme Court of Wisconsin held that the injunction could not properly be issued but declared that the (p. 290)

"temptation to exercise all the powers possessed by this court to cure or alleviate a situation such as is disclosed by the evidence in these cases is very great."

The court pointed out that one of the attorneys who per-

sonally testified, apparently (p. 286)

> "feels safe not only in violating the laws of a sister State and the canons of professional ethics, but in flaunting the violation in the face of his accusers as if to say, 'Here it is, what are you going to do about it?' "

The Court further specified (p. 286) that the attorneys were guilty of the offense of barratry as defined by the laws of Wisconsin. Wisconsin Statutes, 1929, 348.325 provides penalties of fine and imprisonment for common barratry, which it defines as "the practice of soliciting, maintaining or exciting judicial proceedings."

Champerty is another regular feature of procuring these cases for importation into Minnesota. *Winders vs. Illinois Central R. R. Co.*, 177 Minn. 1, was a case procured by the last mentioned Minneapolis personal injury attorneys and sued in Minnesota under the Federal Employers' Liability Act to recover for personal injuries sustained by plaintiff while working on one of defendant's trains in the State of Kentucky where he resided. The Supreme Court of Minnesota held that the Court below properly denied a motion to dismiss on the ground that these attorneys were engaged in the practice of improperly importing such cases with the expectation (p. 4)

> "that the railroads will rather submit to unjust exactions than incur the inconvenience and expense of a trial at a point hundreds or thousands of miles away from where the witnesses reside."

After pointing out that the attorneys loaned plaintiff $500 the Supreme Court declared that (p. 5)

> "The trial court rightly refused to dismiss the action even though convinced that plaintiff had retained his attorneys under a champertous agreement, or that they

are, by illegal methods, obtaining cases for prosecution in this state which in fairness ought to be tried elsewhere."

In concurring with that conclusion Mr. Justice Stone made the following significant statements concerning the methods employed by such attorneys *as a class* (p. 6):

"The courts of Minnesota are trying every year a mysteriously large number of foreign personal injury cases. * * * Thus far, most of such cases have been against railroads, but there has been some evidence of late that foreign automobile personal injury cases are beginning to come. It would be surprising if they did not under present conditions. * * *

"* * * imported cases present features which put them in a class by themselves. It costs money to get them. Competition is keen. * * * It is a common practice for the attorneys procuring a case to finance their client to a greater or less degree pending the litigation. In this case the inference is quite clear that an initial advance of $500 to plaintiff by his attorneys had a very persuasive effect in procuring the contract with him. Such practices result in a very substantial cash investment in the case by the attorneys. That element, necessarily present, possibly explains why many of these imported cases are 'made' by perjury. * * * Neither the vice nor the virtue of them is a monopoly of either side. The point is that the expense of getting the case and holding it results in an unusual temptation to repair its weak points by spurious evidence.

"Furthermore, that these cases, whatever their merits, evidence the existence of open and habitual champerty on a large scale is of course self-evident. The cases are

brought here by unprofessional conduct and practices which are fast making the legal profession and the courts the subject of widespread criticism. * * * It is the too frequent resort to perjury and the dulling effect upon moral sensibilities of familiarity with it which is more to be dreaded than anything else. Nothing need be said to emphasize the vicious character and degrading tendency of the practice of organized and habitual solicitation of any kind of business by attorneys through paid employes. It is especially dangerous to the profession when the potency of the solicitation is enhanced by the promise of whatever financial aid may be needed by the client pending the litigation."

The money advancements commonly made by such attorneys to the owners of causes of action procured for importation do not differ materially from the purchasing of shares in litigation condemned under the name of champerty. The Supreme Court of Wisconsin so held in *C. M. & St. P. R. Co. vs. Wolfe, supra.* It pointed out that the attorneys had advanced to one of the injured men, Hoch, $1,000 on his demand note, plus certain expenses, and had loaned to Wolfe, the other injured man, $1,010 and certain expenses, upon the understanding that those amounts were to be deducted from any recovery obtained, in addition to the attorneys' one-third of the net. The court then declared that (p. 286)

"Advancing funds to clients in consideration of retainer does not differ materially from a purchase of an interest in the claim and the maintenance of a suit thereon for the joint benefit of the purchaser and the client."

Some idea of the large aggregate investments made by the

attorneys in such causes of action may be gained from the Court's summary of the testimony in that case to the effect (p. 285)

> "that none of the expenses of the investigators are charged to clients but are paid by the firm; that the firm maintains a slush fund and entertainment fund; that the investigators were paid about $300 a month; * * * The firm also maintains a corps of expert witnesses; the firm annually loans to clients $50,000; annually pays to Harrigan, chief of the soliciting force, $10,000; pays to investigators annually a total of $18,000, and has other annual expenses of $40,000."

The vicious tendency of such investments by personal injury attorneys in causes of action was thus described by the Court (p. 289):

> "That an organization * * * maintaining a corps of expert witnesses, employing high-powered solicitors, using slush and entertainment funds to secure business and no doubt for other purposes, is a menace to the proper administration of justice cannot be doubted. Having secured business at a large expense, advanced funds to clients, the interest of the members is not as officers of the court in seeing that justice is fairly administered, but that a verdict is secured in each case which will protect their investment and secure to them the fruits of their illicit enterprises."

The above opinions of the Courts speak for themselves. They definitely establish the notorious fact that cases for importation under this Act are procured, fomented and tried in contemptuous defiance of law and proper legal practices. The illicit investments which they embody lead naturally to

illicit methods of recovery. Witness the method of obtaining a recovery in the present case: open and flagrant appeals to passion and prejudice in order to induce the jurors to violate their oath "to impartially try" the case. General Statutes, Minnesota, 1923, Sec. 6965 (3).

A reading of counsel's so-called "argument" to the jury (R. 383-413) discloses an unmistakable purpose to *prevent* the jurors from giving impartial consideration to the questions on which petitioner's liability depended; to substitute in their minds, in place of an impartial attitude, hatred of the petitioner because of the mere fact that it was a powerful railroad corporation opposing the claim of an injured employe; to augment such hatred by insinuating personal attacks on petitioner's counsel as displaying a hard and arrogant attitude towards respondent, as attempting to stamp respondent as a cheat and a fraud, as concocting perjured testimony, as being ingeniously dishonest, as lacking common decency, and as being delighted with anything less than a large verdict, adroitly implying that the jurors would be the dupes of crafty lawyers if they failed to return a large verdict for respondent; all accentuated by dramatic appeals for sympathy for respondent as in danger of becoming a pitiful cripple vainly searching for work; and all without the slightest basis of evidence or justification of any kind.

Since the unscrupulous use of such demagogic methods in personal injury cases makes it easy to obtain verdicts, to share which is the actuating motive and culmination of all the improper practices condemned by the Courts in the foregoing opinions, a decision that a verdict so obtained may not be enforced would promote the public interest by making *all* the practices so condemned less prevalent, through reducing the prospect of their yielding financial returns to the attorneys who indulge in them.

CONCLUSION.

The Court below should be instructed to set aside the verdict and order a new trial.

Respectfully submitted,

HENRY S. MITCHELL,
Counsel for Petitioner.

JOHN E. PALMER,
JAMES L. HETLAND,
Of Counsel.
April 3, 1931.

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Petitioner,

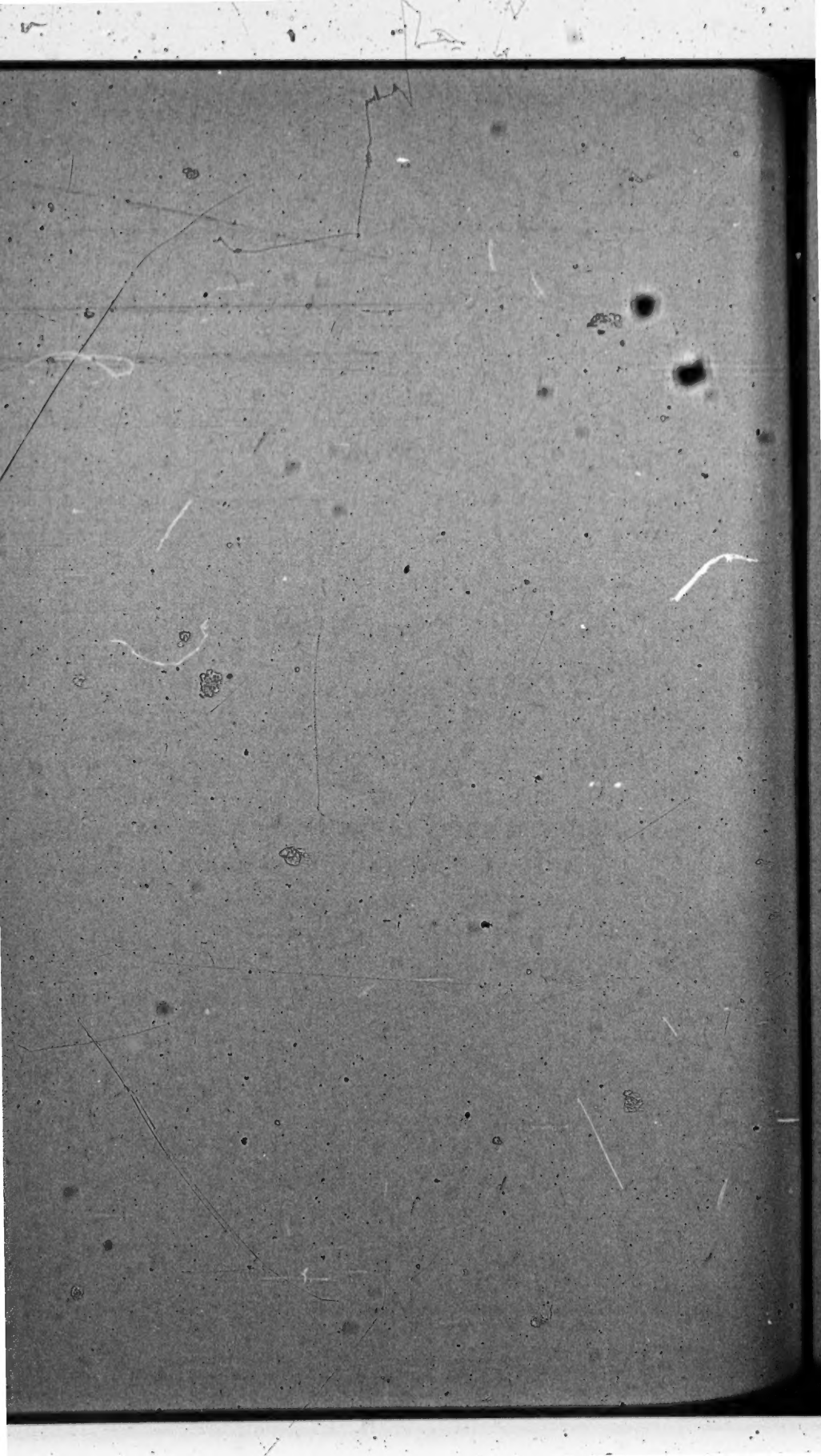
vs.

NOAH MOQUIN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI.

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Minneapolis, Minnesota,
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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Petitioner*,

vs.

NOAH MOQUIN, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Respondent, a brakeman, was injured by the derailment of a freight car upon which he was riding. The derailment was caused by ice covering the rails from one to two inches. The ice was covered by a small drift of snow.

The jury found a verdict in Respondent's favor. The trial court denied a motion for judgment *non obstante* or for a new trial. The Supreme Court of Minnesota in all things upheld the trial court, save that the verdict was reduced from $27,500.00 to $22,500.00.

CLAIMS OF PETITIONER.

Petitioner sets forth four reasons why a writ of certiorari should be granted. They are in substance:

1. The claimed exclusion of the defense that there could be no recovery for injuries sustained through electing to exchange a safe for an obviously unsafe place to work.

2. Error in authorizing the jury to award damages to Respondent for injuries caused by an unsafe condition in remedying which he was engaged.

3. The claim that the jury were instructed that plaintiff could recover regardless of whether Petitioner had exercised ordinary care as to the place of work.

4. The claim that the verdict was the result of passion and prejudice.

STATEMENT OF FACTS.

(Figures in Parentheses Refer to Record Folios.)

This is a simple personal injury action. At the Station of Cloverton, Minnesota, on the day in question, Respondent's duty was to go to the so-called house track, couple onto an empty car, couple this to a car of ties, and then back down the house track. Following this the engine was to come forward and the engineer would operate the flangers on the locomotive and flange out the house track while going in a forward motion. Following this the car of ties was to be switched into the train and the empty car was to be switched back onto the house track, and after it was so switched, Moquin, the brakeman, was to set the brake thereon and leave the empty car.

Flanges are small shovel-like or plow-like appliances fastened to the PILOT of a locomotive. The flanges may be raised or lowered by the engineer. The purpose of the flanges is to remove snow from between the rails and from the inner side of the rails so that the flanges on the wheels

of the locomotives and cars will have free space for running.

A FLANGING OPERATION IS NOT DONE TO REMOVE ICE FROM OVER THE TRACKS. Its purpose is to remove snow or debris so that it will not become hardened and later form ice, which might become dangerous and cause a derailment.

Before the train reached Cloverton the conductor received an order reading as follows:

> "Do a good job of flanging today and advise *what tracks* you flange out. Finish the flanging on No. 50 Tuesday. (Signed) J. E. Mullen" (493) (1911).

When the train arrived at Cloverton, the conductor gave orders to plaintiff, saying:

> "He said 'Tell Dan to *back in* on the house track and after he couples onto that car of ties to *shove down back* down on the house track and flange it out'" (99).

"Dan" was Daniel Carr, the other brakeman, Respondent's fellow servant.

Flanging cannot be done by a box car backing through snow. FLANGING CAN BE DONE ONLY BY THE ENGINE COMING FORWARD, THE FLANGER BEING LOCATED ON THE PILOT OF THE ENGINE.

Before the train reached Cloverton, flanging in addition to other work had been done at four stations.

This flanging was done at Harlis (49) and at Belden (64) and also at Black River and Kingsdale. At each one of these places the flanging operation was performed *after* the locomotive and tender had BACKED through snow. This was done at Belden (65) where the snow was eight or nine inches deep. At each of the other places where the flanging was done before the crew got to Cloverton, the engine

BACKED THROUGH the snow and then came *forward and did the flanging.* This was not disputed. No trouble was experienced at these points.

At the Station of Cloverton there was an empty car and a car of ties on the side track and, under the orders of the conductor to plaintiff, Carr, his fellow brakeman, was to take the engine; couple onto the empty car and the car of ties, back down on the house track, and after this come forward and flange it out.

IT WAS THE INTENTION OF THE CREW TO PUT THE CAR OF TIES INTO THE TRAIN. The movement to the side track was made, the empty car was coupled to the car of ties and the backward movement started down the house track. THIS WAS A PRELIMINARY SWITCHING MOVEMENT AND NOT A FLANGING MOVEMENT. The flanging movement could not be made while the freight car was being backed through the snow.

Plaintiff testified:

"Q. Then the switch would be thrown and then he backed his engine in?

A. Yes, sir.

Q. To the east end of the passing track?

A. Yes, sir.

Q. WHEN HE WAS DOING THAT WOULD HE BE DOING A FLANGING OPERATION AT ALL?

A. NO, SIR.

Q. When he would come back through the snow at the east end what would he do with his FLANGE which was on the pilot?

Mr. Boyle: Objected to as immaterial.

A. WHEN HE GOT CLEAR TRACK he dropped it clear down.

Q. He would drop it down.

The Court: The same ruling. (Exception by defendant.)

Q. FOR WHAT PURPOSE? Just explain the working of the flange after he would drop it down, would he come to the east or west?

A. COME WEST AND THE FLANGE is for the purpose of throwing the snow out from between the rails" (55-57).

After the flanging operation had been completed, it would be Moquin's duty to assist in switching the car of ties into the train and then to ride the empty car back in onto the house track, set the brake thereon and leave it there (126).

"Q. And did YOU have any duty with reference to the flanging operation of either of these tracks?

A. No, sir" (127).

After Moquin got onto the car of ties, his fellow brakeman, Carr, who was on the foot board of the engine, gave a signal to him.

"Q. What did that sign mean?

A. THAT MEANT THAT WE WERE GOING TO SHOVE BACK" (130).

Moquin communicated to the brakeman what the conductor had told him.

"Mr. Davis: Tell the jury what you said to Dan.

A. When Dan got up on the car I told him that the conductor told me to tell him that WE SHOULD SHOVE BACK ON THE HOUSE TRACK and flange that out and go up to the other end and do our switching and back down the passing and flange that out" (132).

From the above quotation it is to be noted that the men

were to shove back onto the house track; that they would THEN come forward and flange the house track out; that they would then do the switching, back down on the passing track and flange that out. In the quotation above the word "and" is used several times but is used in the sense of denoting that which is subsequently to be done. It is used in the same sense as though the words "and thereafter" had been used. This is clear because the FLANGING OPERATION COULD BE CARRIED OUT ONLY WHILE THE CARS WERE GOING FORWARD.

The purpose of a flanging movement is to eliminate the chances of FUTURE DANGER.

A flanging movement is NOT performed for the purpose of REMOVING ICE FROM TRACKS (39-40). The flanging is done to remove the snow. This will PREVENT THE FUTURE ACCUMULATION OR FORMATION OF ICE.

The record does not show that counsel for the railway company at the trial contended the movement was a flanging movement and that, therefore, plaintiff could not recover.

IN THE ENTIRE MOTION TO DIRECT A VERDICT, which is found on pages 546-548, NO CLAIM is made that this was a FLANGING operation instead of a SWITCHING operation.

Moquin testified that MEN WERE NEVER ORDERED TO FLANGE OUT TRACKS WHICH WERE COVERED WITH ICE (39-42). No witness for defendant claimed that men would be ordered to flange when ice completely covered the rails.

After Moquin took his position on top of the car of ties on the house track, he got a back out signal from his fellow brakeman, Carr, the empty car was coupled to the car of ties, and the movement continued down the house track.

Cloverton is a small hamlet of less than 100 people. There

was an ordinary country crossing which was crossed by the car of ties before it reached the point of derailment.

After the cars were started in motion, they went through some small drifts of snow eight to twelve inches in depth and finally into the drift where the derailment happened. The car went through the first drift without any difficulty. It then reached the place of derailment and the wreck occurred.

At the point of derailment sleds had been hauled over the rails and they were covered with ice from one to two inches deep (971). This ice was under the drift of snow.

This ice was present several days before the accident (972-974, 979).

Defendant's section foreman was told about the condition of the track before the derailment occurred (975).

The witness Brewer testified:

"Q. This ice that had been formed across the track, about how far did that extend, in feet, along the track?

A. Well, about from ten to twelve feet, I would say, where this roadway was.

Q. Where the roadway was?

A. Yes, sir.

Q. What kind of ice was it as to being hard or soft ice?

A. It was hard ice, sir.

Q. Had it gotten there suddenly or gradually by accumulation?

A. It had just gradually accumulated there.

Q. Throughout the winter?

A. Traveling back and forth throughout the winter.

Q. Do you know whether you have traveled across there or seen other people travel across there and seen the section foreman around there?

A. I have traveled across there several times myself with a team.

Q. Was the section foreman when you had this talk with him down there, or where did you have this talk with him about the condition of the track?

A. Right at the depot.

Q. Was this before this derailment?

A. Yes, sir" (982-984).

The witness, Charles L. Halstead, who lived at Cloverton, had been employed by the Soo Line as a section laborer (1033).

He was at the scene of the accident the next morning and saw ice on the track (1035-1036). He said ice had formed on both rails for a distance of ten or twelve feet where the teams had been crossing (1039-1040). There was nearly an inch of ice over the top of the rail. At the point of derailment he said that ice would vary from one to two inches thick over both rails (1040). Other evidence was to the same effect (1057, 1063-1064).

This "was good hard ice, packed down by horses' feet" (1066).

The main controversy at the trial was over the question of whether there *was* ice over the rails. Defendant's section foreman said there was no ice (365-370).

A section laborer, Maurer, did not notice any ice (429). Section laborer, Monson, testified to the same effect (455). A roadmaster testified that there was no ice over the rails (1198).

None of the train crew testified as to the condition of the tracks.

One of Petitioner's witnesses testified that soft snow could derail a car even though there were no ice under the snow

(901). But one of Petitioner's witnesses also testified that backing through snow would not cause a derailment; that it was frequently done (936).

There was evidence showing that the car was derailed at the point where the ice covered the rails and that ice covering the rails would be a producing cause of a derailment. When the car was derailed, it tipped partly over and Moquin was thrown from the top and injured. There was no claim at the trial that his position on the car was different from that assumed by any brakeman, even though Petitioner does state that he "precariously" stood on the top of the car.

THE ASSIGNED ERRORS PRESENT NO GROUND FOR THE GRANTING OF A WRIT.

We shall consider as briefly as possible, consistent with presenting a proper picture of the case to the court, Petitioner's claims, intended to be urged, as set forth on Page 11 of the Petition herein.

I. RESPONDENT'S INJURIES WERE DUE TO HIS VOLUNTARILY ELECTING TO EXCHANGE A SAFE FOR AN UNSAFE PLACE TO WORK.

RESPONDENT DID NOT VOLUNTARILY EXCHANGE A SAFE FOR AN UNSAFE PLACE TO WORK. The railway company claimed it was part of his duty to STAY AT THE COUNTRY CROSSING in order to protect it. This contention is followed by the further statement that if he had stayed at the crossing he would not have been injured at the time of the derailment.

Moquin testified that it was his duty to be upon the car to go down the house track in the switching movement and

later to set the brake on the empty car. Petitioner relied upon a company rule reading as follows:

> "A member of the train or engine crew will PROTECT HIGHWAY TRAFFIC at crossings by proceeding each movement over the crossings and see that ALL HIGHWAY TRAFFIC has been STOPPED BEFORE signalling the engineman to proceed."

This rule DOES NOT in terms require the brakeman to STAY at the crossing. Its purpose is for an employee to precede the car over the crossing and see that all highway traffic has been STOPPED. There was NO TRAFFIC at the crossing. There was nothing to "stop."

Defendant's witness Urbahns admitted that the purpose of Rule No. 102 was to PROTECT THE CROSSING.

> "Q. The purpose of Rule 102 so far as it reads is for the purpose of PROTECTING THE CROSSING where travel goes across it, that is *all* you find in the rule, isn't it, in the reading of the rule?
>
> A. Well, *literally*, you might construe it that way" (1542).

Moquin went over the crossing, going toward the car of ties. Defendant's contention is that after he got to the car of ties, he should have turned and again preceded the car over the crossing and that then he should have remained at the crossing. The rule did not require him to remain there. There WAS NO TRAFFIC AT THE CROSSING. THE CROSSING WAS PROTECTED. PROTECTION OF THE CROSSING SATISFIED THE RULE.

Moquin testified he could see five or six blocks each way (1590) and he walked across the crossing toward the car.

> "Q. And when you WALKED OVER THE CROSSING you may tell the jury whether or not there was

anybody coming towards the crossing from either side.

* * * * * * * * *

Q. WAS ANYBODY COMING?

A. No, sir.

Q. AND WHEN YOU SAW NOBODY COMING after walking over the crossing you got up on top of the car?

A. Yes, sir.

* * * * * * * * *

Mr. Davis: And did any vehicles or pedestrians or anybody come across that crossing as you were backing up?

A. NO, SIR" (1592-1594).

Moquin testified that at this crossing at Cloverton, employees of the company habitually, generally, and customarily did the work of protecting the crossing in the same manner that he did on the day in question. There was no violation of the rule. If, however, it could, by any construction, be said that the rule required Moquin to stay at the crossing, then, under the evidence, it conclusively appeared that the rule was customarily and habitually violated with full notice the defendant. The defendant offered no evidence to the contrary.

The trial court held that this rule had no bearing on the case and was inadmissible. The Supreme Court of Minnesota said:

> "Upon the record IT IS DOUBTFUL IF PLAINTIFF HAD VIOLATED the rule, but, if so, such violation had NO CAUSAL CONNECTION with the injury."
>
> *Moquin vs. Minneapolis, St. P. & S. S. M. R. Co.* (Minn.), 231 N. W. 829-831.

This rule is the ONLY BASIS for the contention that

Respondent voluntarily elected to exchange a safe for an unsafe place to work. Under the language of the rule, Respondent had no duty to remain at the crossing, but further than this, Respondent DID NOT KNOW that there was any danger in backing in onto the house track (134). He could not elect to go into a dangerous place if he did not know danger existed. He testified that there was no danger in backing through small snow-drifts. It was conceded that there had been a back-up movement at four other stations on the same day and no trouble had occurred. Moquin knew nothing of the condition of ice over the snow-drift until after he was injured. He made no election or selection as to a place to work. He merely rode a freight car in a movement which he had no reason to believe was dangerous. That the car ran into a track covered with an inch to two inches of ice was something he could not anticipate.

The first claim of error is too inconsequential for serious consideration.

The cases of *Atlantic Coast Line vs. Davis*, 279 U. S. 34, and *Atlantic Coast Line vs. Driggers*, 279 U. S. 787, cited on Page 14 of the Petition herein, are so different from the present case as to facts and applicable rules of law, that a mere reading of them is sufficient to show their inapplicability. The cases will not, therefore, be further discussed.

Coming now to the second claim of the Petitioner:

II. AUTHORIZING THE JURY TO AWARD DAMAGES TO RESPONDENT FOR INJURIES CAUSED BY AN UNSAFE CONDITION WHICH HE WAS ENGAGED IN REMEDYING.

Respondent does not question the general common law rule that a servant engaged in making a dangerous place safe,

with full knowledge of the facts, may assume the risk and not be permitted to recover.

THIS RULE HAS NO APPLICATION. THE CLAIM that Respondent was making a dangerous place safe WAS NOT URGED AT THE TRIAL. Respondent was not attempting to make a dangerous place safe. The place might be kept safe by the flanging movement, which was intended to remove the snow so that ice would not form over the rails. Moquin was engaged in a PURELY PRELIMINARY SWITCHING MOVEMENT and was NOT ENGAGED in a flanging or repairing movement (55-57).

NO WITNESS FOR THE PETITIONER TESTIFIED THAT MOQUIN WAS ENGAGED IN A FLANGING MOVEMENT. The flanger was NOT IN OPERATION at the time of the derailment. The flanger is operated ONLY when the engine is going forward. The derailment occurred when the car was backing down through what was supposedly a harmless snow-drift. No member of the train crew testified they knew there was an inch of ice over the rails under the drift of snow.

We quote from the testimony of Petitioner's witness Urbahns:

> "Q. CAN A FLANGING ORDER BE CARRIED OUT BY BACKING THROUGH SNOW-DRIFTS OR CAN IT BE DONE IN A PROPER WAY?
>
> A. ABSOLUTELY NOT" .(1491).

HAD MOQUIN OR THE CREW KNOWN THAT ICE COVERED THE RAILS, THE ENGINEER WOULD NOT HAVE BEEN ORDERED TO OPERATE THE FLANGER. WHEN ICE OF THIS CHARACTER COVERS RAILS, IT SHOULD BE TAKEN OUT WITH PICK AXES (39-42).

It will be seen, therefore, that PLAINTIFF WAS NOT ENGAGED IN REMEDYING AN UNSAFE CONDITION.

Coming now to the third contention:

III. HOLDING PETITIONER NEGLIGENT AS TO THE TRACK'S CONDITION WITH NO FINDING OF FAILURE TO USE ORDINARY CARE AND PRUDENCE TO KEEP IT REASONABLY SAFE.

We do not question the rule that there can be no recovery unless the proof shows a failure to use ordinary care to the end that the place of work may be kept in a reasonably safe condition.

The charge of the court, taken as a whole, WAS TO THE EFFECT THAT SUCH DEGREE OF CARE WAS REQUIRED BEFORE THE DEFENDANT COULD BE HELD LIABLE.

The trial court inadvertently omitted the word "reasonably" before the word "safe" in one part of the charge. As to this, the Supreme Court of Minnesota in its opinion said that defendant:

> "assigns as error the failure of the court to use the word 'reasonably' before the word 'safe' to which we have referred. Concededly, it should have been used. OBVIOUSLY, its omission was an INADVERTENCE. Counsel FAILED TO CALL THE COURT'S ATTENTION TO IT. UNDER THE WELL-ESTABLISHED RULE, IT CANNOT NOW BE URGED AS ERROR. It is to be noted that the court told the jury that plaintiff claimed defendant had failed to EXERCISE PROPER PRECAUTION to ascertain whether the track was in a 'REASONABLY SAFE condition.' The jury was told that the law required defendant to 'exer-

cise a DEGREE OF CARE COMMENSURATE WITH THE RISKS to prevent the accumulation of ice and snow in such quantity, form and location as to be a menace to the safety of the employees working in the yard'."

At the close of the charge of the court this appears:

By the Court: "Have counsel any other suggestion or request?

Mr. Boyle: No, your Honor" (1866).

There was no previous suggestion or criticism of the omission to use the word "reasonably" before the word "safe." Counsel took no exception to the failure to use the word "reasonably" but apparently assumed the correctness of the charge as indicated by the following exceptions:

"Mr. Fryberger: The defendant excepts to all that part of the court's charge in which he, in substance, instructed the jury that it was the obligation of the defendant to keep the tracks at Cloverton REASONABLY free from snow and ice" (1872).

"The defendant excepts to all that part of the court's charge which, in substance, instructs the jury that defendant would be liable if it allowed snow to remain for an UNREASONABLE length of time" (1872-1873).

Counsel also took an exception to the following:

"The defendant excepts to all that part of the court's charge which, in substance, tells them that it was the duty of the defendant to furnish A REASONABLY SAFE PLACE for the plaintiff to work inasmuch as there is NO EVIDENCE of any nature or description that the place to work was not safe" (1873).

It will be seen from the above exceptions that counsel

proceeded as though the word "reasonably" had been incorporated in the part of the charge complained of.

THE CHARGE OF THE COURT.

In stating the claims of the plaintiff, the court said:

> "Plaintiff claims that snow and ice were permitted to accumulate upon the tracks and that, under the circumstances existing at the time and place in question, this snow and ice remained upon the track A SUFFICIENT LENGTH OF TIME to have enabled the defendant, IN THE EXERCISE OF ORDINARY AND REASONABLE CARE, to have discovered the fact that it rendered the house track unsafe for the passage of cars over it" (1797-1798).

The court also told the jury that if the ice and snow had been on the track a sufficient length of time "so that the defendant BY THE EXERCISE OF ORDINARY AND REASONABLE CARE should and could have known of such condition" that then the jury might find the defendant negligent (1799). All through the charge *negligence* was made the basis of plaintiff's right to recover. At defendant's request the court charged the jury:

> "And again: 'The MERE FACT that the car was derailed and the plaintiff Moquin was injured does not make the defendant railway liable for his injuries. The fact that the ACCIDENT HAPPENED on the railway company's tracks and while its engine and cars were being moved about does not prove nor tend to prove that the railway company was negligent. In cases like this, NEGLIGENCE OF THE RAILWAY MUST BE THE GROUND OF RECOVERY; and BEFORE PLAINTIFF CAN RECOVER HE MUST ESTABLISH by a

fair preponderance of all the evidence that the railway company was NEGLIGENT and that such negligence was the direct and proximate cause of his injuries'" (1827-1829).

The failure to use ordinary care was made the basis of recovery in several places in the charge. We call the court's attention to the following:

"And, furthermore, it is for you to determine from all the evidence in the case whether or not the section foreman in charge of this section of the railroad received ACTUAL NOTICE, that is, knowledge, ACTUAL KNOWLEDGE, whether he was ACTUALLY INFORMED, that there was ice and snow upon the rails of the house track in question A SUFFICIENT LENGTH OF TIME BEFORE THE ACCIDENT TO HAVE ENABLED THE RAILWAY COMPANY, through its employees, TO REMOVE SUCH ICE, if you find it existed, prior to the accident. * * * If, from all the evidence, you are satisfied that the DEFENDANT COULD NOT HAVE REASONABLY ANTICIPATED that an accident might happen on that account, then the defendant would not be negligent" (1800-1801).

In view of the charge, taken in its entirety, Mr. Chief Justice Wilson, speaking for the Supreme Court of Minnesota in this case, said:

"We are of the opinion that the instructions taken as a whole DID NOT LEAD THE JURY TO BELIEVE THAT THE DEFENDANT WAS AN INSURER OF THE SAFETY OF THE PLACE TO WORK."

The portion of the charge particularly complained of is the following:

"The main question before you is first whether or not the defendant railway company WAS NEGLIGENT in its failure to keep this house track in a safe condition for use by its employees, IN THAT IT, as the plaintiff claims, had PERMITTED ICE AND SNOW to accumulate upon this track and SO RENDERED IT IN AN UNSAFE CONDITION, AND that the defendant failed to have PROPER and TIMELY inspection made of the house track in question and that the defendant railway company failed to ascertain whether or not such house track was safe for the passage of cars over that house track" (1795-1796).

It would have been better had the word "reasonably" appeared before the word "safe" in this charge, but it is to be noticed that following the words "safe condition" the court qualifies "safe condition" by saying "in that it * * * permitted ice and snow to accumulate upon the track," etc.

This instruction is different from an instruction laying down an unqualified rule that it is the duty of the defendant to maintain a safe place to work.

The instruction might well read that the question was whether defendant was negligent IN THAT IT PERMITTED ice and snow to be on the track. As the case now stands, Petitioner does not seem to question, and cannot question, in view of the jury's verdict, the fact that the track WAS unsafe, because of the ice and snow thereon. In view of that fact, therefore, the use of the words "safe condition" in the instruction amount to little, because they were followed BY THE QUALIFICATION "IN THAT IT * * * PERMITTED ICE AND SNOW * * * TO ACCUMULATE UPON THIS TRACK."

An ACTUALLY DANGEROUS condition was proven by

the plaintiff. No one claimed the track would be safe if covered with ice. The situation is different than a case where there may be a considerable question whether the condition WAS or WAS NOT dangerous or as to WHAT DEGREE OF CARE should be exercised. IN THIS CASE, NO ONE CONTENDS THAT THE TRACK WAS EVEN IN A REASONABLY SAFE CONDITION IF IT WAS COVERED BY ONE TO TWO INCHES OF ICE.

In the same charge the court refers to PROPER AND TIMELY INSPECTION, which are ELEMENTS OF ORDINARY AND REASONABLE CARE.

A dangerous condition existed, as appears by the overwhelming weight of the testimony and as found by the jury and both lower courts. There was no question of "reasonably" safe but the condition was unqualifiedly DANGEROUS.

With this dangerous condition existing, defendant would be liable if it could reasonably have anticipated that an accident might happen.

Christianson vs. Chicago, St. P. M. & O. R. Co., 67 Minn. 94, 69 N. W. 640.

Baker vs. Great N. R. Co., 83 Minn. 184, 86 N. W. 82.

No claim was made at the trial of any error because of the use of the word "might" in the instruction. Nor was such question raised in the Supreme Court of Minnesota.

It cannot be said, from a reading of the charge, that the jury would naturally understand that an improper standard of care had been given by the court. The words "safe condition" in the charge complained of, if omitted, WOULD NOT CHANGE THE EFFECT OF THE INSTRUCTION. The instruction would simply have been that the question was whether defendant was negligent IN THAT IT PER-

MITTED ICE AND SNOW TO BE UPON ITS TRACKS.

From what has been said, it cannot but be apparent that the claim that the defendant was held liable without a finding of a failure to use ordinary care to keep the track reasonably safe CANNOT BE SUSTAINED. ALL THROUGH THE CHARGE IT APPEARS THAT RECOVERY WAS BASED UPON NEGLIGENCE AND THE FAILURE TO EXERCISE ORDINARY CARE. Furthermore, THERE IS NO CLAIM THAT THE TRACK COULD BE MAINTAINED EVEN IN A REASONABLY SAFE CONDITION WITH ICE FROM ONE TO TWO INCHES OVER THE RAILS.

The Supreme Court of Minnesota in its opinion, in speaking of the inadvertent omission of the word "reasonably" said:

> "OBVIOUSLY, ITS OMISSION WAS AN INADVERTENCE. COUNSEL FAILED TO CALL THE COURT'S ATTENTION TO IT. UNDER THE WELL-ESTABLISHED RULE, IT CANNOT NOW BE URGED AS ERROR."

It is a rule of practice in the State of Minnesota that errors of this type cannot be urged unless they are called to the court's attention and an opportunity be given to correct the alleged error. Defendant failed to comply with this rule. The question of practice is for the state court. It does not present a ground for the granting of a writ of certiorari.

The fourth point relied on for the granting of the writ is as follows:

IV. BASING THE JUDGMENT ON A VERDICT CORRUPTED BY PASSION AND PREJUDICE.

There is NOTHING PREJUDICIAL in the argument of counsel, although the Minnesota Supreme Court did state that some parts of the argument were without justification. HOWEVER, THIS POINT WAS WAIVED BY PETITIONER. At the trial of the case NO EXCEPTION WAS TAKEN to any remarks of counsel. COUNSEL WAS GIVEN NO OPPORTUNITY TO CORRECT OR RETRACT ANY STATEMENT. Under the well settled practice in the State of Minnesota, unless the prejudicial remarks are called to the court's attention at the time, THEY CANNOT LATER BE ASSIGNED AS ERROR.

As stated by the Supreme Court of Minnesota in this case:

> "The rule of procedure in such cases RESTS UPON DEEP PRINCIPLES FROM WHICH WE SHOULD NOT DEPART. IT IS THE SETTLED PRACTICE. *Christopher vs. Custom Laundry Co.* (Minn.), 229 N. W. 136; *State vs. Peterson*, 167 Minn. 216, 208 N. W. 761; *State vs. Cotter*, 167 Minn. 265, 209 N. W. 4; *Estate in re Weber*, 163 Minn. 389, 204 N. W. 52; *Seitz vs. Claybourne*, 180 Minn. . . ., 231 N. W. 714. It gives an opportunity for correction or retraction."

Mr. Chief Justice Wilson further said:

> "No objections or exceptions were made and taken at the time of the argument."

UNDER THE MINNESOTA PRACTICE, THE QUESTION COULD NOT BE RAISED IN THE SUPREME COURT OF MINNESOTA, and clearly it cannot now be raised in the Supreme Court of the United States.

There is nothing in the case of *New York C. R. Co. vs. John-*

son, 279 U. S. 319, cited by counsel for Petitioner, to sustain its contention or which would require or justify the issuance of a writ in this case.

In that case counsel stated matters to be in issue which were not in issue, stating that a defense was made which was not made. Objection was taken at the time to these claims. The point was raised that the objections were not sufficiently specific, but the objections were taken, and, therefore, the case is different from the case at bar, WHERE NO OBJECTION WAS MADE TO THE ARGUMENT and no exceptions taken. Furthermore, no state rule of practice was involved in the Johnson case.

The Johnson case was tried in a Federal Court. The present case was tried in a state court of Minnesota, WHICH HAS ADOPTED A RULE never departed from and resting, as Mr. Chief Justice Wilson said, "upon deep principles from which we should not depart. It is the settled practice." This rule is to the effect that error cannot be assigned unless the matter was called to the court's attention at the time.

PETITIONER FAILED TO COMPLY WITH THE RULE IN MINNESOTA. The question of the adoption or enforcement of such rule is ENTIRELY FOR THE STATE COURTS, and, therefore, the claim of error because of the argument of counsel can afford no ground for the issuance of the writ.

CONCLUSION.

This simple personal injury action arose out of a derailment. NO REAL QUESTIONS OF LAW ARE INVOLVED. NO QUESTION OF THE CONSTRUCTION OF ANY FEDERAL STATUTE IS AT ISSUE. BOTH STATE COURTS held that Respondent should recover. Pe-

titioner had a fair trial of a case in which THE EVIDENCE SHOWS IT WAS BOTH MORALLY AND LEGALLY LIABLE.

No great or far-reaching principles of law could be laid down in this case. ITS DETERMINATION IS NOT ESSENTIAL FOR THE HELP OR GUIDANCE OF COUNSEL OR LITIGANTS IN THE FUTURE. The matters at issue were matters which, under our system of jurisprudence, ARE FOR DETERMINATION BY STATE COURTS. There was no conflict with any Federal rule of liability. The railway company presented fully all the evidence it claimed to have at the trial. The petition should be denied.

Respectfully submitted,

TOM DAVIS AND ERNEST A. MICHEL,
419 Metropolitan Bank Building,
Minneapolis, Minnesota,
Attorneys for Respondent.

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FILED
DEC 27
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Petitioner,*

vs.

NOAH MOQUIN, *Respondent.*

MOTION TO DISMISS, AFFIRM, OR TRANSFER FOR HEARING TO SUMMARY DOCKET.

TOM DAVIS AND
ERNEST A. MICHEL,
Attorneys for Respondent,
Minneapolis, Minnesota.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

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MOTION TO DISMISS, AFFIRM, OR TRANSFER FOR HEARING TO SUMMARY DOCKET.

Now comes the above named Respondent, and respectfully asks that this court dismiss the writ of certiorari herein granted on the 8th day of December, 1930, on the ground that the same was improvidently granted for the following reasons:

1. The petition for the writ of certiorari herein inaccurately and incorrectly stated the facts in connection with the arguments of counsel for the Respondent.

2. That under the long settled rule and practice in the State of Minnesota, any misstatements of counsel to the jury must be called to the attention of the court at the time in order to provide counsel with an opportunity to retract, and the court with the opportunity to admonish counsel and instruct the jury to disregard the statements made, and that

the failure of Petitioner to take exception or call attention to the remarks has resulted in a waiver of its claim, under the settled Minnesota practice.

3. That the verdict in a case, where the moral and legal rights are with plaintiff, could easily be sustained by a cold blooded resort to figures and mathematics.

4. Respondent further moves the court that the judgment of the State of Minnesota be affirmed because the question upon which the decision of the cause depends has been determined by many decisions of the Supreme Court of Minnesota, and because it has been the settled policy of the Supreme Court of the United States not to reverse causes on a mere question of practice nor where the points relied upon were not made in the trial court of the state and were waived under the state rule.

In the alternative, in the event the foregoing motions be denied, then the Respondent moves the court that the action be transferred for hearing to the summary docket of this court because the case is of such a character as not to justify extended argument.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys of Record for Respondent,
Minneapolis, Minnesota.

(Same Title.)

NOTICE OF MOTION.

The petitioner is hereby notified that respondent will, on the 12th day of January, A. D. 1931, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of said court the foregoing and annexed motions, and each of them, and the brief in support thereof, hereto attached, all of which are now and herewith served upon you.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
Minneapolis, Minnesota.

Received a copy of the foregoing notice and the brief thereto attached, by personal service thereof, this..... day of December, 1930.

....,
Attorneys for Petitioner.

STATEMENT OF FACTS.

In this case a petition for writ of certiorari was granted, the review being limited solely to the claim of improper conduct of counsel for plaintiff in his argument to the jury.

The facts, generally, appeared in the petition for certiorari in Respondent's brief in opposition thereto. However, a more detailed statement as to the facts bearing upon the immediate question may be helpful to the court.

1. The petition for the writ of certiorari herein inaccurately and incorrectly stated the facts in connection with the arguments of counsel for the Respondent.

On Page 21 of the petition for certiorari, it is stated that Respondent's counsel represented railroad companies generally by saying "that they are perjurers and liars." The words in quotation marks are followed by reference to Record, Page 561. The record does not bear out this statement. It is incorrect and untrue.

This isolated statement, as it appears in the petition, would *lead the court to believe that counsel had called railroad witnesses perjurers and liars. Nothing was further from the truth.* This case was hotly contested. It was vigorously fought by the *attorneys for the railway company whose argument does not appear in the record.* The part of the argument appearing at Page 561 of the Record, being Folio 1683, is not as above stated but the exact language is as follows:

> "I have often wondered if the time would ever come when *an injured man* could come into a court of justice without having a railroad company try to fasten upon him that *he* was a perjurer and a liar."

This is a lot different than calling railroad witnesses perjurers and liars.

Moquin had testified that as he lay on the ground, after having been thrown from the car, he *saw* the ice around the track and saw where the flanges of the car had cut into the ice. Moquin also testified that the brakeman Carr had told him "ice derailed that car." Carr, on the stand, vehemently and vigorously denied making any such statement. See Record, Page 561, Folio 1682.

Furthermore, defendant's section boss and section laborers put the lie squarely to Moquin, saying there was no ice over the rails. It was in answer to testimony of this kind that the statement of counsel was made. The statement, as it appears on Page 21 of the railway company's petition, would *indicate* that counsel called witnesses for the railway company perjurers and liars. *This is not the truth.* This was *not* done. Plaintiff's counsel merely stated that there was an attempt by defendant to fasten upon *plaintiff* that *he* was a perjurer and a liar. This is much different than calling railway company employees perjurers and liars.

Plaintiff could not have been mistaken about seeing the ice over the rails. If he did *not* see it and he testified that he *did*, he *was* a perjurer. Plaintiff's counsel simply stated that defendant attempted to fasten this charge onto him.

At Folio 1737, Page 579, counsel did state that he was fighting for the "under dog." This is a fact and certainly there can be nothing wrong in making this statement. If this be a crime, if it be wrong to fight for poor people, then many of the great lawyers of the past and present were guilty of misconduct. Daniel Webster, Henry Clay, and Abraham Lincoln took up the cudgel for the under dog.

One of the largest personal injury verdicts ever returned in the State of Minnesota was returned in a case where Mr. Pierce Butler, now an Associate Justice of this Honorable Court, was *attorney for the plaintiff*, and the Minne-

apolis Street Railway Company was the defendant. Any one who knows the methods of defense of the Minneapolis Street Railway Company will know that Mr. Butler certainly represented the under dog in that case.

Associate Justice Brandeis has often represented the under dog, and Chief Justice Hughes certainly fought for the under dog when he made his great fight against powerful insurance companies. The same thing could be said of other members of this Court. It is no crime to fight for the under dog.

The defense to the case was characterized as "ingenious and dishonest." Page 580, Folio 1738. When *three disinterested witnesses* testified that there *was* ice over the rails at the point of derailment and defendant brought in three or four employees to testify that there was *no ice* over the rails, there could be no question of a mistake. Some one was not telling the truth. Plaintiff's counsel very frankly told the jury that the defense was a dishonest defense. *It is dishonest to state that the track was in good condition and no ice on it when it appears by three disinterested witnesses that ice covered the rails to a depth of one or two inches.*

A reading of the petition for writ of certiorari gives an entirely *wrong impression* of counsel's argument. Counsel (who is not the writer of this brief) does argue forcefully to a jury, and does not mumble his words in talking to the jury, but we submit to the court that a reading of the argument merely shows a zealous advocate, earnestly striving to secure justice for his client.

It certainly cannot be the rule that an attorney can not argue for such sum as he believes proper and adequate for his client. From a reading of the entire argument of counsel it very clearly appears that, based upon the cold record, plaintiff was entitled to a larger award of damages than actually given to him.

THE WRIT WAS IMPROVIDENTLY GRANTED.

We feel that the statement appearing on Page 21 of the petition, citing Page 561, "that they are perjurers and liars" *mislead the court* into granting the writ. *On Page 561 of the record we find no such statement. The* statement is a misquotation and *might well mislead the court.* Plaintiff's counsel did say that the defendant was trying to fasten upon *him* (plaintiff) the charge that "*he* was a perjurer and a liar." (Folio 1683.) This is *very different* from the bald statement that "they are perjurers and liars."

Where a writ is improvidently granted, it should be dismissed.

See *Furness, Withy, etc., Co. vs. Yang-tsze,* 242 U. S. 430, 61 L. Ed. 409.

Houston Oil Co. vs. Goodrich, 245 U. S. 440, 62 L. Ed. 395.

2. That under the long settled rule and practice in the State of Minnesota, any misstatement of counsel to the jury must be called to the attention of the court at the time in order to provide counsel with an opportunity to retract, and the court with the opportunity to admonish counsel, and the failure of Petitioner to take exception or call attention to the remarks has resulted in a waiver of its claim, under the settled Minnesota practice.

The Federal Employers' Liability Act *was not intended to effect settled rules of practice in state courts.* Petitioner failed to comply with the state rule of practice. No substantial question, which would justify *overturning the state practice of Minnesota,* is presented by the petition. Under the Minnesota rule, which petitioner does not and can not dispute, exception must be taken to remarks of counsel at the

time they are made. This was not done. As Chief Justice Wilson, who wrote the opinion of the Minnesota Supreme Court said: *"The record was not protected."*

Under the Minnesota rule, it is the duty of counsel to call attention to any improper remarks so as to give opposing counsel an opportunity to retract and the court an opportunity to admonish the jury to disregard the statement. This was not done. The settled rule of Minnesota was not followed. The petition for certiorari might well have misled the court by referring to *New York Central vs. Johnson*, 279 U. S. 310, which was *not* a case tried in a *state* court, but was tried in a Federal Court. In that case *objections were made* to the argument *at the time*, the main complaint being that they were not sufficiently specific.

If the Supreme Court of the United States is to take jurisdiction of this cause, because of claimed error in the argument of counsel, it means that the Supreme Court is going to overturn the settled rule of practice which has always existed in Minnesota. Certainly this could not have been made to appear to the court at the time of the granting of the writ. Had this appeared, we feel confident that the writ would not have been granted.

3. That the verdict in a case, where the moral and legal rights are with plaintiff, could easily be sustained by a resort to cold figures and mathematics.

Under the statute of Minnesota, a new trial may be granted where it *appears from the evidence* that the verdict is the result of passion and prejudice. There is nothing in this record to show that it was the result of passion and prejudice. No amount of passion or prejudice could *change the fact that there was ice over the rails, as testified to by three disinterested witnesses.*

Passion or prejudice did not account for the verdict of $27,500.00, when under the cold facts the verdict could have been much larger. The court could calmly sit down with pencil and paper and, taking the admissions of defendant that plaintiff could not again do railroad work, the court could well figure his verdict to be higher than the sum returned by the jury.

A reading of the opinion of the Supreme Court of Minnesota shows that morally plaintiff was entitled to damages. It also shows that legally he was entitled to damages. A resort to mathematics will disclose that the verdict could have been larger.

Now, after a trial in the District Court, after the argument in the Supreme Court of the State of Minnesota, when it appears that no objection was made to the argument of counsel, a reversal is sought in the Supreme Court of the United States on a point which the Supreme Court of Minnesota said was waived because the "record was not protected."

Right, justice and morals are on the side of plaintiff. The law of Minnesota is with plaintiff. Legally, the railway company had no complaint because the "record was not protected." This was the holding of the Supreme Court of Minnesota. In a matter of practice, the state court is supreme.

4. Respondent further moves the court that the judgment of the State of Minnesota be affirmed because the question upon which the decision of the cause depends has been determined by many decisions of the Supreme Court of Minnesota, and because it has been the settled policy of the Supreme Court of the United States not to reverse causes on a mere question of practice nor where the points relied upon were

not made in the trial court of the state and were waived under the state rule.

Never, so far as we have been able to learn, has the Supreme Court of the United States taken jurisdiction of a cause *solely* because of a claimed error when that error related only to *a matter of practice* which was *solely for the state court.*

It would be a startling reversal of all rules were jurisdiction of this cause to be retained and the same heard and determined, solely because of the claimed error in the argument of counsel, *which was waived under the settled rule of practice of Minnesota.*

See decisions cited in the present case. *Moquin vs. Soo Line,* 231 N. W. 829.

We have found no decisions of this court holding that settled rules of state practice would be overturned because the case happened to arise under a Federal Act.

In *Chesapeake & Ohio R. Co. vs. DeAtley,* 241 U. S. 310, 60 L. Ed. 1016, Mr. Justice Pitney said, speaking of a complaint as to the form of certain instructions:

> "Although the present action was based upon a federal statute, it was *triable* and *tried* in a *state* court. Hence, *local rules of practice and procedure were applicable.*"

The question of making an objection or taking exception to the argument and giving counsel a chance to make corrections or retraction, and the court a chance to admonish the jury to disregard the argument—these are *matters of practice,* the same as rules of evidence, sufficiency of the pleadings, etc.

The Supreme Court of the United States has consistently

held that in actions under the Employers' Liability Act, *state rules of practice and procedure govern.*

In *Central Vermont R. Co. vs. White,* 238 U. S. 506, 59 L. Ed. 1433, Mr. Justice Lamar said:

> "There can, of course, be no doubt of the general principle that matters respecting the remedy such as the form of the action, sufficiency of the pleadings, rules of evidence and the statute of limitations depend upon the law of the place where the suit is brought."

Under the rule in the DeAtley case this writ was improvidently granted. The argument in this case was not vicious. It was strong and forceful, but even if we should assume that the argument was the most vicious and prejudicial one imaginable, still "local rules of practice and procedure" would be applicable, within the decision of the DeAtley case, *supra.* It cannot be that it was the intention of the court to *overturn the DeAtley and White cases,* as well as many other cases of this honorable court holding rules of practice to be matters for determination by the state court.

In *Minneapolis & St. Louis R. Co. vs. Bombolis,* 241 U. S. 211, 60 L. Ed. 961, the late Chief Justice White said:

> "It was, of course, presumably an appreciation of the principles so thoroughly settled which caused Congress in the enactment of the Employers' Liability Act to *clearly contemplate the existence of a concurrent power* and duty of both *federal and state* courts to administer the rights conferred by the statute in *accordance with the modes of procedure prevailing in such courts.*"

In the alternative, in the event the foregoing motions be denied, then the respondent moves the court that the action be transferred for hearing to the summary docket of this

court because the case is of such a character as not to justify extended argument.

In the event that the motion to dismiss the writ be not granted and in the event that the motion to affirm be not granted, then this case should be advanced.

In these modern days of speed and efficiency, it should not be necessary that an injured man be dragged through all the courts of the land before there can be a final determination of a simple personal injury case.

No grave questions are presented and the matter should be hastily and speedily determined.

The not very commendable practice has grown up, and is increasing, as a search of the records of this court will show, of railroad companies applying for *writs of certiorari* in too large a number of cases where it is apparent that the purpose is largely "to play the string out" and to take the injured man to the last court in the land before payment be made to him. The question involved in this case can be adequately presented to the court in a very limited argument, and Petitioner very earnestly asks that the case be advanced for hearing, in the event that a dismissal be not ordered, to the end that the rights of the injured man and the railway company may be quickly determined.

The only thing which could give any color whatever to the position of the railroad company in this case is the statement in the opinion "that the verdict is excessive because of passion and prejudice."

The state court did not hold that *any other branch* of the case was affected by passion and prejudice but limited it to the *amount* of the verdict.

This does not mean that the passion and prejudice arose from the argument of counsel. It could not mean this, because the court specifically held this point to be waived.

The Minnesota court reduces verdicts as excessive on the theory that the excessiveness is due to passion and prejudice in many cases where there is nothing to indicate passion and prejudice *except the mere size of the verdict.* It is in *this* light that the present opinion must be considered.

As showing the practice in Minnesota, we call attention to the case of *Podrick vs. Great Northern R. Co.*, 128 Minn. 228, 150 N. W. 807. In that case a verdict of $35,000.00 for personal injuries was reduced to $30,000.00. The reduction was made *solely* because the court thought the amount was too high, *not* because *any passion or prejudice* affected it.

In the case at bar, the opinion of the Minnesota Supreme Court does not say that passion and prejudice affected the verdict on the *question of liability,* but solely that the verdict was excessive, appearing to have been given under the influence of passion and prejudice.

The applicable Minnesota statute is as follows:

Mason's Minnesota Statutes, 1927, Section 9325:

> "A verdict, decision or report may be vacated, and a new trial granted on motion of an aggrieved party, for any of the following causes materially affecting his rights: * * *
>
> 5. Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice."

Although this statute, in terms, requires that it must appear that the verdict was the result of passion and prejudice, the practice has grown up of granting new trials or reducing verdicts *because the court figures the amount too large.* In such cases, presumably, the passion and prejudice appears *from the mere size of the verdict.*

In *Carlson vs. Payne,* 150 Minn. 480, 186 N. W. 291, a

verdict for $57,789.77 was reduced to $45,000.00. In that case the plaintiff had lost both arms.

As stated by Taylor, Commissioner, who wrote the opinion of the court:

> "Defendant relied mainly on the contention that the verdict is excessive."

The verdict was reduced *but in no place in the opinion does it appear that there is any claim that the verdict was the result of passion and prejudice.* Nevertheless, it *was* reduced.

The two Minnesota cases last cited show the practice in the state of reducing verdicts if the court believes they are too large. Merely because the opinion in the present case stated that the verdict was excessive because of passion and prejudice does not taint or corrupt the entire verdict, as contended for by counsel for petitioner herein.

In any event, the passion and prejudice *extended only to the amount* of the verdict. The question of the *amount* of damages *is not a question to be considered by this court.*

The excessiveness of the verdict in this case was, in the opinion of the court, cured by reducing it to $22,500.00 from $27,500.00. It is the settled practice for the Supreme Court of Minnesota to reduce verdicts if the court deems them excessive. *This is done where no facts appear to give rise to the claim of passion and prejudice except the size of the verdict.*

If the verdict, as rendered, was excessive, this excess was cured by the reduction of the verdict. The *amount* of the verdict and the amount of damages to be returned is not a question for this court. Although the amount may be large, the matter is wholly for the state court.

In speaking of the question of damages in a case which

was tried in a state court, Mr. Justice Van Devanter used this language:

> "Finally, it is said that the award of $5,000 as damages for pain and suffering, even though extreme, for so short a period as approximately thirty minutes, is *excessive*. The award *does seem large*, but the *power*, and with it the *duty* and *responsibility*, of dealing with this matter, *rested upon the courts below*. It involves only a question of fact, and is *not open to reconsideration here*."
>
> *St. Louis, I. M. & S. R. Co. vs. Craft*, 59 L. Ed. 1160, 237 U. S. 648.

It is to be remembered that the Supreme Court of Minnesota had no difficulty in finding the defendant company liable. The sole question as to passion and prejudice was the *amount* of damages. The verdict as reduced represents the judgment of the Supreme Court of Minnesota on this question and cured any question of excessiveness.

There is no question but that the defendant is liable in some amount. This being so, argument of counsel could only have increased the *amount* of the damages returned. The *amount* of damages is for the jury in the first instance, and later for the Supreme Court of the state.

The real meaning of the decision of the Supreme Court of Minnesota is that in the opinion of the court the damages were too high. The Supreme Court of Minnesota said the point of any error in the argument of counsel to the jury was waived. This is a question of state practice. For the Supreme Court of the United States to consider this question now introduces a new, startling and revolutionary practice.

CONCLUSION.

Because of the misleading character of the petition for certiorari herein, the court was undoubtedly led into granting the writ. *The petition for the writ did not clearly advise the court that the Supreme Court of the State of Minnesota had held that the point was not raised.* We do not find this fact *clearly set forth* in the petition for the writ, but instead, on page 24, we find the statement that the Supreme Court of Minnesota held that the *failure to raise the point* was *non-essential* in granting the relief * * * because passion and prejudice influenced the verdict.

This is a misleading statement, because the Supreme Court of Minnesota, instead of holding the failure to make the objection *non*-essential, specifically held that it *was essential* that the objection be made and *the court specifically stated that the record was not protected* (Record, page 676).

The court further stated: "The rule of procedure in such case rests upon deep principles from which we should not depart. It is the settled practice" (Record, page 677).

This statement is *inconsistent* with the *misleading statement in the petition* on page 24 to the effect that the Minnesota court held that the omission—that is, the failure to make an objection to the argument—was "non-essential." To the contrary, the Supreme Court of Minnesota held it *was* essential. *It held that where no objection was taken, the point was waived.* Undoubtedly, the misleading statement in the petition led to the granting of the writ herein.

The writ was improvidently granted. It was granted because of a misstatement of the facts. This court should not be called upon to review a question which *is purely one of local practice.* To do so would be a departure from the

settled rules of this court. To do so would be to overturn the practice of many years.

Furthermore, the petition gives an erroneous impression of what counsel actually said to the jury. It conveys the impression that he called railroad witnesses perjurers and liars. This is not so, as appears from the actual statement made and heretofore quoted. Counsel merely stated that the railway company was trying to fasten this charge onto the plaintiff.

Respectfully submitted,

TOM DAVIS AND
ERNEST A. MICHEL,
Attorneys for Respondent,
Minneapolis, Minnesota.

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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Petitioner,

vs.

NOAH MOQUIN,
Respondent.

MOTION TO STRIKE PORTIONS OF PETITIONER'S BRIEF AND RESPONDENT'S BRIEF.

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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Petitioner,*

vs.

NOAH MOQUIN, *Respondent.*

MOTION TO STRIKE PORTIONS OF PETITIONER'S BRIEF.

Now comes the above named respondent and moves to strike from the record and eliminate from consideration herein all that portion of the Brief of the Petitioner commencing on the middle of page 13 of said Brief to and including page 27, and the first five lines of page 28, on the following grounds:

1st: That the matter in said Brief above referred to is not material, pertinent or relevant to any issue now before this Court.

2nd: That it is intemperate, inflammatory, frivolous, is intended and designed to prejudice the Court and that the same constitutes an unwarranted attack on counsel for Respondent.

3rd: That the portion of said Brief above referred to is not pertinent to the matter here under review, the petition

for certiorari herein having been limited to the question of whether the particular verdict involved in this case "was obtained by appeals to passion and prejudice." See opinion of this Court upon the granting of the Writ, 51 Sup. Ct. Rep. 105.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
419 Metropolitan Bank Building,
Minneapolis, Minnesota.

NOTICE OF MOTION.

The Petitioner herein is hereby notified that Respondent will, upon the hearing of this cause, before the Supreme Court of the United States submit for the consideration of said Court the foregoing Motion to strike portions of Petitioner's Brief on the grounds stated in said motion.

TOM DAVIS AND ERNEST A. MICHEL,
Attorneys for Respondent,
419 Metropolitan Bank Building,
Minneapolis, Minnesota.

RESPONDENT'S BRIEF.

THE MOTION TO DISMISS THE WRIT AS IMPROVIDENTLY GRANTED OR TO AFFIRM SAID CAUSE.

Heretofore and after the granting of the petition for Writ of Certiorari herein, a motion was made to dismiss the Writ of Certiorari on the ground that the same was improvidently granted, or in the alternative to affirm said cause.

The consideration of said motions were by this Court held in abeyance and the determination thereof postponed to the hearing of the case on its merits.

STATEMENT OF THE CASE.

Respondent, a freight brakeman, was injured by the derailment of a freight car, caused by snow and ice over the rails of one of defendant's tracks, which caused the car in question to leave the tracks, resulting in serious personal injuries to respondent.

A jury found a verdict in Respondent's favor for $27,500.

The trial court denied a motion for judgment notwithstanding the verdict or for a new trial.

The Supreme Court of Minnesota in all things affirmed the trial court, save that it reduced the verdict to $22,500.00.

After judgment was entered a Petition for Writ of Certiorari was filed in this Court.

Many grounds for the granting of the Writ were alleged. The principal claims related to the question of the place to work (p. 11 of Petition for the Writ); the claim that plaintiff was engaged in making an unsafe place safe (p. 14 of Petition) and the claim that there was no finding of a failure to use ordinary care (pp. 16-20 of Petition). The question

of passion and prejudice was apparently a sort of afterthought, Petitioner realizing it had waived the point under the state practice and attempting to avoid the state rule under the doctrine of *N. Y. Cent. v. Johnson*, 279 U. S. 310 (p. 20 of Petition). In the brief of Respondent in opposition to the granting of the Writ it was pointed out that the Johnson case had no application, that case having been tried in a Federal Court and *involving no state rule of practice*. The Johnson case is not even cited in Petitioner's Brief on the merits.

This Court granted the Writ saying: "The Petition for a Writ of Certiorari in this case to the Supreme Court of the State of Minnesota is granted, *limited* to the question arising from the failure of the state court to grant a new trial in a case under the Federal Employers' Liability Act where the *verdict was obtained* by *appeals* to passion and prejudice." *Minneapolis, St. P. & S. S. M. R. Co. vs. Moquin*, 51 Sup. Ct. Rep. 105.

Following the granting of the Writ, Respondent moved to dismiss the same as improvidently granted, or, in the alternative, asked the Court to affirm the judgment below. Consideration of this motion was by the Court ordered to be heard when the matter was argued on the merits.

STATEMENT OF FACTS.

This is an ordinary, simple personal injury action in which a railroad freight brakeman was injured because a freight car left the track, due to the negligence of section men in permitting ice and snow to be over the rails. *This was the claim of the plaintiff* and the jury having found in plaintiff's favor it must be taken as established that such were the facts.

THE ARGUMENT OF COUNSEL FOR RESPONDENT.

This Court, in granting the Writ of Certiorari, limited it to the question of whether error was committed by counsel in his argument to the jury, that is "by appeals to passion and prejudice."

The practice in Minnesota requires defendant's counsel to make the first argument which practice was followed in this case. Under the state practice each side has but one argument.

In the Petition for the Writ of Certiorari and in the Brief in support thereof and in the Brief of Petitioner, which is supposedly on the merits of this cause, portions of the argument of counsel for Respondent are set forth with the claim that the same constitute prejudicial misconduct. A few isolated phrases are quoted which do not convey a proper idea of the argument.

NO OBJECTION TO COUNSEL'S ARGUMENT.

No objection was made to counsel's argument, no exception taken thereto and the Supreme Court of Minnesota held that the "record was not protected." We will, however, consider for the present the argument on its merits.

DEFENDANT'S ARGUMENT NOT BEFORE THE COURT.

The argument of counsel for Respondent was taken by the court reporter. *The record does not show the argument of counsel for the railroad company.* In view of this fact it would not be proper for counsel for Respondent to quote the nature of the argument of railroad counsel nor to char-

acterize railroad counsel because of what occurred in his argument to the jury. One thing can be pointed out to the Court, however, and that is that the *Brief* of Petitioner in this case, and especially pages 13 to 28, *is so inflammatory, prejudicial, unfair and wholly irrelevant* that the Court might well conceive what type of argument counsel, who will present this sort of a brief to the Supreme Court of the United States, would be likely to present to a jury. This Court is here faced with a situation similar to that where only a part of a conversation is given. The argument of plaintiff's counsel appears but the Court does not have defendant's argument.

ENTIRE ARGUMENT SHOULD BE CONSIDERED.

To revert now to the argument of Mr. Davis to the jury:

It is a fundamental rule of law that a new trial will not be granted because of errors in the charge of the Court to the jury where these errors consist of mere isolated statements or a sentence here and there in the charge. Such excerpts must be read in connection with the entire charge.

Likewise, assuming that the Court can consider the merits of the claim of Petitioner herein, the Court should consider *the entire argument of Respondent's counsel.* This argument starts at page 383 of the record. We very earnestly suggest to the Court a most careful reading of it. It is a fair, clean, forceful argument but it is not an appeal to passion and prejudice.

Pages 383 to 390, inclusive, and 391, deal with some generalities and largely with the question of liability in this case. The argument is a fair and proper discussion of the facts and no just cause for criticism of it can be found.

At the bottom of page 391 and the top of page 392, counsel

made the following statement:

> "I have often wondered, in the years I have tried cases for these poor devils who are injured, and for their widows and orphans, who have to fight for their rights against these railroads, I have often wondered if the time would ever come when an injured man could come in a court of justice without having a railroad company try to fasten upon him that he was a perjurer and a liar. I wonder if it is true that the only time men can tell the truth is when they draw their pay checks from the railroad company. These men know where their pay checks come from, from the Soo Railroad, and I say it discounts their testimony, the same as it discounts anybody else's testimony."

The first part of this quotation is one of the statements that Petitioner's counsel, who presented this most prejudicial brief, say constitutes prejudicial error. There is no question but that the jury had a right to consider the interest of any witness in the outcome of the case and the Court so instructed them.

NO OPPORTUNITY TO CORRECT STATEMENTS TO JURY.

What lead to the remark that the railroad company was trying to fasten the charge of perjury onto plaintiff? It is fair to assume that some conduct of the defendant brought forth this comment. Was it because of the fact that *after plaintiff and three disinterested witnesses testified ice covered the rails* that the company *tried to show that the derailment occurred before the car reached the ice?* As the Supreme Court of Minnesota in this case said: "Defendant's

evidence puts the derailment *before it reached the crossing* and attempts to attribute the derailment to the presence of snow only" (467).

Had there been an objection to the argument of counsel for Respondent, *counsel could have stated for the record* that his language was *in answer to certain language of counsel for Petitioner* or that the statement was made because of something that developed at the trial but we have no record of any interruption or objection and no record of what counsel for the railroad company said in his argument to the jury.

Does it seem possible to this Court that where the railroad company *first denied that there was ice over the rails* and *then* claimed that the derailment occurred *at a place other than where the ice was proven to be*—under such circumstances would railroad counsel be likely to extol the virtues of the plaintiff as an honest man?

Moquin was either telling the truth or he was telling a falsehood. Under the circumstances it would be difficult for the Court to assume that railroad counsel told the jury that plaintiff was an honest man and that he was telling the truth. To admit that Moquin told the truth would be practically admitting liability. Although we do not have the argument of counsel for the railroad company, we do have the vigorous denial of any liability.

DISCUSSION OF LIABILITY. REFERENCE TO RAILROAD COUNSEL.

Pages 392 and 393 deal with the question of liability and on page 393 counsel for Respondent pays a nice compliment to the counsel for the railroad company.

On page 394 there is a further discussion of the evidence as to liability as there is on pages 395, 396 and 399. How-

ever, in referring to one of the counsel for the railroad company, Mr. Fryberger, plaintiff's counsel said:

> "You either have to go out, men and women, and find that these three men from Cloverton lied and the only men who can tell the truth are these section men who are responsible for this very accident or else you have to find that this plaintiff ought to recover, and I say the time, I doubt if it comes, when three men looking as honest and hard-working and square as those men, come into a court of justice—working over there at Cloverton in the wilderness, taking care of their families, their wives and their little children, they come here to you men and women and they have told you the living truth of the living God and no man knows it better than Fryberger. *He has sat in this case, one of the keenest, able corporation lawyers in the great state of Minnesota, a man cool, calculating and who has been the guiding spirit in this defense.* He has sat here, men and women, suggesting to Mr. Boyle what steps he should take and what he should ask. There is not a man, there is not a woman, on this jury who does not know that Mr. Brewer and Mr. Halstad and Mr. Burden told the truth when they said there was ice under the wheels of those cars where they went off the track."

This excerpt certainly contains no calculated appeal to passion and prejudice. It is legitimate argument.

The Brief of Petitioner states that Petitioner's counsel was called a "'cool, calculating' corporation lawyer" (Petitioner's Brief, page 4). This is *misleading*. From the quotation just made it is seen that Respondent's counsel said of Petitioner's counsel that he was "one of the keenest, able corporation lawyers in the great state of Minnesota, a man

cool, calculating, and who has been the guiding spirit in this defense" (R. 397). What is wrong with that statement? We submit that an appellate court cannot say as a matter of law that the statement that a man is one of the keenest, able corporation lawyers in the State is an inflammatory statement, designed to prejudice the jury. Neither is the statement that an attorney is "a man cool, calculating" in any way prejudicial.

"A."

ASSUMPTION OF RISK—LEGAL QUESTIONS.

On page 398 the question of assumption of risk is discussed and the question of a mere accident is discussed on page 399. Also on pages 399 and 400, the question of proximate cause is discussed. General questions of liability are further discussed on pages 401, 402 and 403 and then on the last paragraph on page 403, counsel comes to the question of damages.

QUESTION ON CERTIORARI LIMITED.

The Petition for Certiorari was granted in this case and limited to the question of the failure of the state court to grant a new trial "where the verdict was obtained by appeals to passion and prejudice." In the present case, the *verdict* was not obtained by appeals to passion and prejudice. There is no passion and prejudice shown in the argument of counsel. Other than this, there is no attempt to show passion and prejudice, save by the mere size of the verdict.

VERDICT ON LIABILITY NOT RESULT OF PASSION OR PREJUDICE.

The verdict on the question of liability was not the result of passion and prejudice, because the verdict could not be otherwise than in plaintiff's favor under the great mass of testimony supporting plaintiff's claim. The *amount* of the verdict, the *size* of the verdict, might possibly be said, assuming Petitioner's position to be correct, to be the result of passion and prejudice, but, if so, we have a case where *merely the amount* of the verdict is the result of passion and prejudice and *not a case where the ultimate right of recovery rests on passion and prejudice.*

ARGUMENT ON DAMAGES.

The portion of the argument devoted to damages is made the target for Petitioner's criticism.

We quote the first part of counsel's argument on this question:

> "We come now to the measure of damages. What should this man recover? Now, I know something about juries. I think I know something about the difficulties of trying these cases. I think I know something about the difficulties of a man, single-handed, fighting a powerful corporation. I think I know something of the feeling of superiority that sometimes reposes in the breasts and hearts of men who represent corporations. I think I know somewhat the handicaps that may surround a man who will fight for what they call the underdog. I have tried cases under those laws as far West as Montana and as far East as the State of Ohio. I have addressed juries in those states in behalf of injured men

and the widows and orphans of men who were killed, and I want to say to you men and women of Crow Wing county, never in my life have I seen as ingenious and dishonest a defense as is put up in this case" (403-404).

What gave rise to the remark as to "the feeling of superiority that sometimes reposes in the breasts and hearts of men who represent corporations"? (R. 403.) This Court does not have the argument of railway counsel before it. This Court does have, however, the Brief of Petitioner and if pages 13 to 28 do not show a feeling of superiority on the part of defendant's counsel, who point to the words "abuse of the legal profession," "improper and demoralizing Practices" (p. 14, Brief of Petitioner), we do not properly interpret the meaning of words. To say that the Amendment of Congress "has been flagrantly perverted" (p. 15, Petitioner's Brief); to complain about "imported cases"; to insinuate that plaintiff's counsel are an "offshoot of the legal profession" (19); to speak of "notorious practices in flagrant violation of representative professional opinion"; to charge violation of laws of other states (19); to speak of "champerty," inferentially charging Respondent's counsel therewith (24); to insinuate that "imported cases are made by perjury" (25); to speak of "open and habitual champerty" (25); to speak of "illicit investments" and "illicit methods of recovery" (26-27)—all such remarks and statements in the Brief of Petitioner must certainly convey to this Honorable Court some idea not only of the feeling of superiority of Petitioner's counsel but such statements disclose an amazing lack of fairness and a gross violation of ethics and the rules of this Honorable Court. More especially is this true when the statements above are made with reference to so-called "imported cases." *The present*

case arose in the State of Minnesota. Plaintiff lived in the State of Minnesota at the time he was injured. The Brief of Petitioner, on page 13, says, *"The present case was not an imported one."* Even were the case one which arose in another state, there would be no justification for the statements and insinuations contained on pages 13 to 28 of the Brief.

Because a lawyer happens to represent poor people, must he submit to any attack corporation counsel may see fit to make; must he see his clients pilloried and make no defense; must he even witness the spectacle of having a railway company claim, first, that ice did not cover the rails and cause the car to leave the track, and, in the next breath, to say that the derailment occurred at a place other than where the ice covered he track? Can the railroad company make such claims with the insinuations which must follow and still insist that a plaintiff's counsel remain entirely silent and not come to the defense of his client?

NO APPEALS TO PASSION OR PREJUDICE.

Again at the start of the argument on the question of damages, counsel uses this language:

> "Here comes a man in the prime of life, forty-six years of age, giving to this mighty railroad eighteen of the best years of his life, working for them, and because of their negligence and because of the laziness of those section men, he is hurled from the top of a moving car, fourteen to twenty feet, weighing 212 pounds, landing on his feet on the solid ice and ground below and falling on his back, and but for the providence of Almighty God, had he not turned himself away, he would have been crushed under the moving wheels of that car. And we

find a railroad company coming into court to fight that man and send him out of this court room stamped as a cheat and a fraud. Moquin has told you the truth. If these three men from Cloverton had never come here, the testimony of that simple, honest man, standing alone, would be enough to convince any honest man or woman that the Soo Railroad, in common decency and common honesty, if they possess it, should pay this man. I want to say to you men and women I do know what it costs to fight a railroad. It is hard. It is not easy. It is hard. I know that oftentimes as I try these cases —and I am not an extremely religious man, but perhaps from a good mother I have learned at times to even ask the aid of a Divine Power to give me strength to present cases honestly. I have passed the half century mark. It will not be many years, perhaps, before I will be through trying lawsuits. I love to try them. I love the fight, but it is hard, and it is hard because of the neglect. Why couldn't this railroad have photographed that track? Why didn't they? Just ask yourselves when you go out in the jury room" (404).

The two quotations above are not designed appeals to the passion of the jury. They were not so intended and should not be so construed.

At page 404, Counsel makes reference to the fact that the attorney for the railroad company had suggested to the jury that the plaintiff should not have over $6,000.00. After referring to this statement, plaintiff's counsel said:

"*He is not asking for a dollar he has not lost.* This man is not asking for a red cent *that is not his.* But by the eternal gods *he is entitled to what he has lost* and it is not $6,000.00, as we discuss this testimony. And

let me tell you if this jury should bring in $26,000.00, the first men to send a wire to Minneapolis and laugh would be Fryberger and Boyle" (405).

This is not inflammatory. The jury were not asked to punish the defendant. They were asked to give plaintiff compensation. It certainly is legitimate argument to ask a jury to adequately compensate an injured man.

As showing the fairness of the argument of counsel, we quote the following:

"I am not asking you for a dollar in this case except what the evidence shows this man should have, and if that is a large amount I want him to have it and the Soo Railroad ought to want him to have it" (407).

Is this an appeal to prejudice? Can it be said to arouse the passion of the jury to ask them to give what the evidence shows plaintiff is entitled to?

Counsel also stated to the jury the following:

"Now, he don't have a run as a conductor and he never could get it, because there isn't a railroad company in the world that would hire him in that condition and you know that. So what will he do? I can see him, along with thousands of others marching, dragging himself up to the doors of the factories and the workshops of America, and I can see him applying for work and by his side see thousands of men out of employment, with two strong arms and two solid legs and a solid back, in competition against him. Who is going to hire him? Just stop and think about it. He is handicapped for life. He goes out into an economic world, men and women, handicapped by the negligence of his master and when he raps at the door and says, 'I want to work,' by the side of him is a strong man who says, 'I

want to work and I will work for the same wages and there is not a thing the matter with me,' who is going to be hired?" (408.)

Is there anything wrong about this language:

"I think it would be a terrible thing if in ten years from now you, in the same condition, could not earn a livelihood, could earn probably $60.00 a month. Is there any reason why you should do it? Is there any reason why you should take away from this man one cent that he has coming? I say to you men and women I have tried these cases long enough to know human nature and before this jury brings in a verdict of that kind, as a tribute to the line of defense the Soo Line has put in here, don't bring this man a dollar. Send him out stamped as a fraud, a cheat, a faker, *rather than give him a verdict that he is not entitled to*" (410).

NO APPEALS TO SYMPATHY.

At no place in the argument was the jury told to treat the defendant any differently than any other defendant. Counsel did not ask the jury to punish the defendant because it was a railroad corporation. Counsel merely asked the jury *to give plaintiff what he was entitled to.* If the time has come when it is wrong to ask a jury to bring in a verdict which will *compensate* an injured man, which will give him what he has lost, then there is little need of a jury argument in any cause.

Under the specific holding of the Supreme Court of Minnesota, passion and prejudice accounted for the size of the verdict; that is, it was larger than it otherwise might have been. The Minnesota Supreme Court *did not hold* that pas-

sion and prejudice *accounted for the verdict against* defendant, but merely caused it to be *larger* than it otherwise might have been. *This was cured,* in the opinion of the Supreme Court, *by the reduction of the verdict.*

We have, therefore, a situation where the Supreme Court of the State said that the verdict was too large, because of passion and prejudice, but, under the familiar practice in the courts in that state, *the error was cured* by the reduction.

On page 28 of the Brief of Petitioner, *it is said* that the argument of counsel for plaintiff in the court below contained *dramatic appeals for sympathy. Where are they? There are no such appeals for sympathy.* Counsel for plaintiff specifically said, *"I am not here pleading for sympathy"* (411).

Counsel further said that he was *not "asking for a dollar he has not lost"* (405).

Furthermore, "I am not asking you for a dollar in this case *except what the evidence shows this man should have"* (407).

These are not dramatic appeals for sympathy. The jury was specifically told counsel was not asking anything for sympathy and *was asking only that the plaintiff be given that which he had lost, which the evidence showed he should have.*

Can anyone legitimately object to the following argument:

> *"I am not here pleading for sympathy. I am not here pleading for anything but the common justice that a laboring man is entitled to,* and the time must never come, men and women, when a man who works for a living, when a man who works for a great and mighty railroad company, cannot walk into the courts of jus-

tice and there *have his rights determined as fairly and as honestly as though he were the highest man in the land*" (411).

Again, counsel said this:

"You take this case and when you write that verdict *write it with an eye to justice and to honesty and to fairness,* and when you bring your verdict in that man, stranger though he may be to you, will be waiting here to receive that verdict. It is not a matter of importance whether the verdict satisfies me or not. It is not a matter of importance whether the verdict satisfies Mr. Fryberger or Mr. Boyle, but it is a matter of importance that you do not take a dollar away from this man that he has lost" (411-412).

This is *an appeal to fairness,* not passion or prejudice.

We have quoted a few excerpts from the argument in order that the Court may get the idea of the spirit in which the case was presented. *The argument was not inflammatory.* It was not improper. It was a strong argument, an argument in which counsel showed some zeal for his client but it was an argument in language which was proper and *there was no appeal in any part of the argument to any passion or prejudice.* A reading of the entire argument will without doubt convince the Court of the correctness of the position of Respondent and of the claim that the argument was in no way improper.

DAMAGES NOT EXCESSIVE IN FACT.

If this Court is to consider the question of whether the argument of Respondent's counsel was an appeal to passion and prejudice, and is to consider the matter *de novo* as a

trier of the fact, then the question of what damages Moquin was entitled to is one which this Court should consider and determine as a fact, We do not believe that this Court is concerned with the amount of the damages returned but in view of the fact that the writ was granted and the cause is now before this Court, we call attention to the following: Moquin had a normal expectancy of 25 years as appears from the argument of counsel (406-407). He was earning $3,000.00 per year. If he earned nothing in the future and had he worked all of his expectancy his gross earnings would have totalled $75,000.00.

On page 407 of the Record, counsel, however, stated that it would be unfair to return such a verdict to Moquin. Counsel then proceeded to explain the expectancy tables and finally, on page 408 of the record, counsel suggested that although Moquin had been earning $250.00 a month; that the jury should figure that in his injured condition he might earn $125.00 a month. There certainly was nothing unfair about this. He had lost his ability to work as a railroad man at the wage of $250.00 per month. If he lost $125.00 a month, one-half of his previous earning power, over a period of twenty-five years he would have lost $37,500.00. Such sum, at 4% interest, as counsel pointed out (409-410), would return to him about one-half of what he had been earning. Counsel even went further and at the top of page 412 suggested to the jury that if they wanted to give all the advantage to the railroad company, Respondent would still be entitled to $26,000.00 in loss of earnings. It is apparent from this record and it can be seen by reading the figures given in the argument of Respondent's counsel that from a cold-blooded, mathematical, dollars and cents basis, the verdict could have been larger than it was.

It may be suggested in view of this, "Why did the Supreme Court of Minnesota reduce the verdict?" The answer is merely because the practice has grown up in the State of reducing verdicts when the Court thinks they are too high. As pointed out on pages 12 to 14, inclusive, of the Brief on the Motion to Dismiss or Affirm herein, verdicts are customarily reduced by the appellate court in Minnesota, even though no passion or prejudice appear or is claimed, other than as might appear from the mere size of the verdict. And, in the cases mentioned in the brief on the Motion to Dismiss, the Supreme Court of Minnesota reduced verdicts without even saying that the verdicts were the result of passion and prejudice.

NO OBJECTION TO THE ARGUMENT.

We wish again to call the attention of the Court to the fact that at the conclusion of all the testimony, after the arguments of both counsel, the Court asked the following question: *"Have counsel any further suggestion or request?"* (431.) *"Mr. Boyle: No, your Honor.* I have some exceptions, but I suppose we can take those after the jury goes out" (431).

The exceptions were to certain portions of the charge and the failure to give certain requests.

These exceptions had no reference whatever to the argument to the jury and neither during the argument nor after the argument was anything said by defendant's counsel, nor any complaint made as to the argument.

The case was tried before an upstanding District Judge in the State of Minnesota. *He found nothing improper in the conduct of the case. He heard the trial. He heard the arguments of both counsel to the jury.* He asked counsel

the question of whether there were any suggestions. He was not asked to admonish counsel as to any statement made to the jury nor was he asked to instruct the jury to disregard any statement counsel may have made. He promptly denied the motion of the railroad company for a new trial.

THE CLAIM OF PETITIONER.

At the top of page 4 of the Brief of Petitioner it is said that plaintiff's counsel made "a highly inflammatory speech." This is an incorrect generality and an incorrect conclusion. Following this statement is the claim that plaintiff's counsel suggested that railroad companies tried to fasten the charge onto the plaintiff "that he was a perjurer and a liar" (392).

The above statement is the only statement in the entire argument which Petitioner criticizes which had anything to do with the question of liability in this case. The next criticized statement as appears from page 4 of Petitioner's Brief is a statement appearing at page 403 of the Record. This statement was made during the argument of counsel as to damages.

MOQUIN'S TESTIMONY IN DIRECT CONFLICT WITH THAT OF DEFENDANT'S WITNESSES.

We have, therefore, on the question of liability, a statement of counsel for an injured man in which he says:

> "I have often wondered if the time would ever come when an injured man could come into a court of justice without having a railroad company try to fasten upon him that he was a perjurer and a liar. I wonder if it is true that the only time men can tell the truth is

when they draw their pay checks from the railroad company" (392).

In addition to what has heretofore been said as to the defendant's claim that there was no ice over the track when Moquin said there was, the defendant claimed that the accident happened at a place other than where the ice covered the track. There are other conflicts in the testimony, it being apparent from the whole Record that defendant claimed Moquin was not telling the truth. One Rennie, the conductor, stated that he did not remember whether he had told Moquin "that ice derailed that car" (see argument of counsel, bottom of page 391). The witness Carr, a brakeman, took the stand and he was asked if he had not stated to Moquin that ice derailed the car, which he denied.

"Q. Will you now state that you did not tell Noah Moquin there that you had stated to the company in the investigation that there was ice on the rail that caused the derailment, ice and snow, isn't that a fact, Mr. Carr?

A. No, it is not" (157).

Moquin said Carr made this statement to him (366).

With testimony of this kind in the record Moquin certainly would not be characterized by defendant's counsel as a truthful man.

It cannot be that, in the administration of justice an injured man may be dragged through all the courts and finally deprived of his right to recover the damages which a jury, a trial court and the highest court of a state have said belonged to him because his counsel truthfully and correctly stated *that the railroad company, in effect, claimed that the plaintiff was a perjurer and a liar. This is just exactly what they did claim.* Moquin testified that the rails where the car went off the tracks *were covered* by snow and ice;

that some of the ice was over the top of the rails. *In this he was substantiated by three disinterested witnesses.* But the *section men and other employees* of the railroad company *said there was no ice over the rails.* There was no chance for a mistake. There *was* ice over the rails or there was *no* ice over the rails. Either Moquin or Carr told the truth as to the statement "ice derailed that car" (366) (391). In any event, this statement related to the quesion of liability and there can be no question in the mind of any unbiased person who reads this record but that the railroad company was negligent and responsible for the derailment of the car which injured Moquin.

But the company went further and even advanced the claim that the derailment did not take place where the ice covered the rails although the testimony of plaintiff and his witnesses was positive on this point.

NO ERROR IN REFERENCE TO DEFENDANT COMPANY OR HANDICAPS OF PLAINTIFF.

We come now to another "offense" committed by plaintiff's counsel. To quote from page four of the Brief of Petitioner:

> "He spoke of 'the difficulties of a man, single-handed, fighting a powerful corporation'; the 'feeling of superiority * * * of men who represent corporations'; and the handicaps of a man fighting in behalf of 'what they call the under dog'" (R. 403).

This statement was made in connection with the argument on the question of damages. Unfortunately, this Court does not know what counsel for the railroad company said in his argument to the jury. It does not know what con-

duct during the trial might have produced the remark but, regardless of this, is a jury so silly, so utterly devoid of sense, so easily swayed, that the statement that a man is fighting a corporation and that he represents the under dog is going to take from a jury its common sense and destroy the ability of a jury to properly decide a case? The idea is not only preposterous. It is downright silly. The jury system is the law of the land, despite the fact that there are continued attempts to lessen the jury's influence. We think the statement of the Supreme Court of the United States in *Jones vs. East Tennessee, V. & G. Ry. Co.*, 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478, although on another point is applicable to this situation:

> "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide questions *as* these as well as others."

Could this allegedly highly inflammatory language of counsel arouse such passion and prejudice in the minds and hearts of jurors that they could not perform their function? If so, we must presume that the jury had no intelligence. We can hardly do this, despite the criticism heaped upon juries by counsel for railroad companies. We would rather take the view of the late Justice McKenna who said:

> "The jury, as one of the tribunals of the country, must be presumed to have *some* sense."
>
> *Norfolk & W. Ry. Co. vs. Holbrook*, 235 U. S. 625, 35 Sup. Ct. Rep. 143, 59 L. Ed. 392.

On page four of the Brief one of the allegedly highly inflammatory statements is that counsel for Respondent described him as "giving to this mighty railroad eighteen of the best years of his life." This is called an *inflammatory*

statement. It needs no comment. By no possible stretch of the imagination can such a statement as this be deemed highly inflammatory or an appeal to passion.

Then it is said on page four of the Petitioner's Brief that the company came into court "'to fight that man and send him out of this court room stamped as a cheat and a fraud' when it 'in common decency and common honesty, if they possess it, should pay this man'" (R. 404).

Respondent WAS stamped as a cheat and a fraud. The evidence of the railroad company was directly opposite and diametrically opposed to that of Moquin. *There was no room for mistake. Either there was ice over the rails or there was no ice over the rails.* Moquin could not have been *mistaken* about it. If the ice was over the rails, he told the truth. If he said there was ice over the rails when there was no such ice, he did not tell the truth. Counsel for Respondent did not mince matters. He spoke out. He called a spade a spade. This was no occasion for pussy-footing, no occasion for weasel words or straddling. *Moquin was either honest or dishonest* and counsel squarely put the issue up to the jury. In this connection, it might be stated that the record showed that three disinterested farmers at Cloverton, where the accident happened, in all things sustained the Respondent in his contention.

Had it not been so serious, it would have been amusing to note the defense to the effect that the place where the ice covered the tracks was not the place where the car was derailed. The first claim was that of the section men that there was no ice over the rails. When this defense seemed wobbly, it was claimed that the derailment happened at some other place. As counsel for plaintiff stated, "Their defense seems to be that the ice was ten or twelve feet from where three men said it was" (385).

On page four counsel for Petitioner takes offense because Respondent's counsel referred to him as "a cool, calculating corporation lawyer" (397). As hereinbefore pointed out, the above quotation may be misleading.

It may be that it is a heinous offense to refer to one as cool, calculating. We wonder how it compares with repeated assertions of counsel for railroad companies that those who fight for injured men are "ambulance chasers"? How does it compare with that portion of the Brief of this railroad company, pages 13 to 28, all of which pages have nothing to do with the matter here at hand but contain references to illegal and unlawful practices by attorneys, to champertous contracts, to subornation of perjury and to "ambulance chasing"?

The last quotation from the argument of counsel for Respondent which appears in the Brief of Petitioner on page four was a reference to Respondent as "dragging himself up to the doors of the factories and the work shops of America" in search of employment (408). To characterize this statement as a highly prejudicial and inflammatory remark that would arouse the passion and prejudice of the jury is to call "white" "black." It was a statement fully justified and a proper and legitimate argument.

THE POSITION OF THE SUPREME COURT OF MINNESOTA.

The Supreme Court of Minnesota *upheld the verdict* in this case, as reduced. It held that the railroad company *was guilty of negligence*, proximately causing Respondent's injury. On the question of the *ultimate liability* of the railroad company, the Supreme Court of Minnesota had no difficulty.

On the question of misconduct in the argument of counsel the Supreme Court of Minnesota said: "The record was not protected. Counsel for *defendant adopted a course* which this court does not approve" (471). The court then said that the settled principles and the settled rules in the State of Minnesota *would not be departed from* and that any question of any error as to the argument of counsel *was not properly before the court.*

THE ALLEGED ERROR OR PREJUDICIAL CONDUCT AS TO COUNSEL'S ARGUMENT RELATES TO THE QUESTION OF DAMAGES.

The only comfort that the railroad company can get from the majority opinion of the Supreme Court of Minnesota is from the following statement: "From the entire record before us we are of the opinion that the verdict is excessive because of passion and prejudice."

It is to be noted that this statement says, "From the entire record." The only claim of anything in the record causing the excessiveness is the alleged passion and prejudice in the argument of plaintiff's counsel.

This court has limited the review in this case to the question of whether "the verdict was obtained by *appeals to passion and prejudice.*"

There is no statement by the Supreme Court of Minnesota that the verdict was the result of any *appeals* to passion and prejudice.

The railroad company takes much comfort from the dissenting opinion of Mr. Justice Stone of the Minnesota Supreme Court. Counsel for Petitioner does not, however, refer to the partial dissent of Mr. Justice Dibell of the Minnesota Supreme Court who states: *"I do not agree that pas-*

sion or prejudice is shown and that there should be a reduction of damages. The verdict should stand. Otherwise, I am in accord with the opinion" (472).

In the dissenting opinion of Mr. Justice Stone, it is said that the "jury yielded to passion and prejudice *in assessing damages.*" He states that the conclusion of passion and prejudice arises "when the *verdict is compared* with those customarily rendered where a farmer or artisan is the plaintiff and the defendant not a railway company."

Of course, the *amount of damages* is no concern of this court but, arguendo, it might be remarked that if a farmer or ordinary artisan were the plaintiff and had shown a loss of vocation and a loss of a maximum earning capacity of $3,000.00 per year, the verdict would doubtless have been approximately the same as that rendered. We doubt if counsel can find any record of an action where a farmer or artisan is the plaintiff and similar facts on the question of damages appear. If so, the verdict could not but be large.

Judge Stone dissented from the main opinion because he felt that the railroad company received only "a *small portion* of the relief" which it was entitled to. As he states: "It is for that reason I am unable to agree to the result." In other words, he dissents on the question of the amount of damages, or the size of the verdict.

The decision of the Minnesota Supreme Court, therefore, is:

First, to the effect that *the question of improper conduct of counsel was not raised*, and,

Secondly, that the question of passion and prejudice *had its effect alone upon the size of the verdict, i. e.*, the amount of damages, a question with which this court has no concern.

ARGUMENT.

THE PETITION FOR WRIT OF CERTIORARI WAS IMPROVIDENTLY GRANTED AND IT SHOULD BE DISMISSED.

State Practice Governs. No Objection to Argument. The Judgment Should Be Affirmed.

The question of whether the writ was improvidently granted and the question of whether the judgment should be affirmed will be argued together.

On the question of procedure, the state court is supreme even though the case arises under the Federal Act. The question of making objections and taking exceptions is a matter of local practice. It is not a matter for consideration by the Supreme Court. In *Chesapeake & Ohio R. Co. vs. DeAtley,* 241 U. S. 310, 60 L. Ed. 1016, Mr. Justice Pitney said, speaking of a complaint as to the form of certain instructions:

> "Although the present action was based upon a federal statute, *it was triable and tried in a state court.* Hence, *local rules of practice and procedure were applicable.*"

To the same effect, see *Central Vermont R. Co. vs. White,* 238 U. S. 506, 59 L. Ed. 1433, and *Minneapolis & St. Louis R. Co. vs. Bombolis,* 241 U. S. 211, 60 L. Ed. 961.

The above cases are referred to in the motion to dismiss or affirm.

Remembering now that no objection was taken to the argument and that counsel was given no opportunity to retract any statement which he may have made which might have been deemed improper, or to state for the record that such statement was in answer to argument indulged in by

defendant's counsel, and that the trial court was given no opportunity to admonish the jury not to heed such remark, we come to the long established rule in the State of Minnesota.

THE MINNESOTA RULE.

It is significant that in the Brief of Petitioner herein not one reference is made to the rule in Minnesota which is to the effect that an objection must be taken to the argument of counsel. Petitioner's counsel do not refer to this because it is the undenied and indisputable rule in the State of Minnesota. For instance, *In re Webber's Estate*, 163 Minn. 389, 204 N. W. 52, Mr. Justice Holt, speaking for the Supreme Court of Minnesota, said:

> "The record *does not raise the question* of misconduct of counsel in the final argument to the jury. *The address appears in full in the record*, but at no place was there *any objection made* to the language used. There was only one interruption, and that was when appellant's counsel questioned whether contestant had testified that her mother was 'fond of' the grandchild, and no error is or could be assigned on that incident. IN ORDER TO ASSIGN ERROR ON MISCONDUCT OF COUNSEL IN THE ARGUMENT to the jury, OBJECTION MUST BE MADE AT THE MOMENT THE ARGUMENT BECOMES IMPROPER, SO THAT THE TRIAL COURT MAY BY ADMONITION TO THE JURY, IF POSSIBLE, COUNTERACT ITS EVIL EFFECT. COUNSEL CANNOT SIT SILENTLY BY WHILE THE OBJECTIONABLE ARGUMENT IS DELIVERED AND TAKE EXCEPTION IF THE VERDICT IS ADVERSE. THE TRIAL

COURT'S ATTENTION MUST BE CALLED TO THE MISCONDUCT WHEN IT OCCURS, AND ITS ACTION OR RULING THEN REQUESTED."

The above quotation is a complete answer to the claim of the Petitioner in this case.

There could be no language more in point than the language from the Webber case above quoted, and there is reason and logic back of the rule as given in the Webber case.

Had there been an objection to any part of the argument of counsel for Petitioner, counsel would have had the opportunity to state to the Court that his remarks *were in answer to certain remarks of counsel for the railroad company.* He could have *inserted in the record the remarks of counsel for the railroad company which called for the comment in question.* The argument of railroad counsel was not taken, but, had objections been taken to the argument, a record could have been made. Unfortunately, the argument of railroad counsel does not appear. We do have pages 13 to 28 of the Brief in this Court, couched in language which should give this Court some inkling of what counsel for Respondent had to contend with.

The trial court was present and heard all of the argument. He heard the argument of railroad counsel and, from his vantage point, he found nothing objectionable.

The Webber case gives the Minnesota rule. The rule laid down by this court in the *DeAtley Case,* 241 U. S. 310, *supra,* the *White Case,* 238 U. S. 506, *supra,* the *Bombolis Case,* 241 U. S. 211, *supra,* is *that state rules of practice and procedure govern.* The Minnesota rule and the holding of this Honorable Court make it apparent that the Writ of Certiorari herein should not have been granted, or that the judgment should be affirmed. If it may be said that the

writ was not improvidently granted, certainly the judgment should be speedily affirmed because the question now before this court is wholly without merit.

The Alleged Passion Relates to the Question of Damages.

There is no question from a reading of the opinion of the Supreme Court of Minnesota but that the claim of passion and prejudice could only relate to the matter of damages. This is so because the court says: "The verdict was $27,500. From the entire record before us we are of the opinion that the verdict is *excessive* because of passion and prejudice":— Not RENDERED because of passion and prejudice but EXCESSIVE because thereof.

This relates to amount. This relates to damages. The court does not say that the liability was fastened onto the railroad company because of any passion or prejudice. It does not say that the "inflammatory" argument caused the jury to sustain plaintiff and three disinterested witnesses in plaintiff's contention that ice covered the rails. The opinion says that the verdict is excessive. This can only mean that the amount was too large. It cannot mean that there was a verdict for the plaintiff when there would have been a verdict for defendant but for counsel's argument. *It goes to the amount of the damages, a question with which this court has no concern.*

There can be no question about the fact that this court has no *concern with the mere amount of damages.* As this court specifically stated in *St. Louis, I. M. & S. Ry. Co. vs. Craft,* 237 U. S. 648, 59 L. Ed. 1160: "The award does seem large, *but the power and with it the duty and responsibility, of dealing with the matter, rested upon the courts*

below. It involves only a question of fact, and is not open to reconsideration here."

That is just exactly this case. It involves a question of fact. It involves a matter which was for determination by the lower court. It is not open to review.

There might be a semblance of reason to the contention of counsel for the railroad company if it appeared that a verdict on the question of liability was the result of passion and prejudice. In other words, if the liability depended solely on passion and prejudice, then something could be said for petitioner's argument. On the present record, however, *ultimate liability is in effect conceded.* It must be conceded in view of the jury's verdict. A question of liability, based alone on passion and prejudice, would present an entirely different question than now confronts this court. Responsibility in a case under the Federal Act must be based on negligent conduct. *It was so based in this case. Negligent conduct was overwhelmingly shown.* It was found to exist by the jury. The finding of the jury as to negligent conduct was approved by the trial court and approved without question by the Supreme Court of Minnesota.

There were two dissenting opinions in the Minnesota Supreme Court, one to the effect that no passion or prejudice was shown, the other to the effect that passion and prejudice had been shown *"in assessing damages"* (473).

The Decision of the Supreme Court of Minnesota on the Question of Defendant's Liability.

In the opinion of the Minnesota Supreme Court, it was said:

> "Under the plaintiff's testimony he was acting under orders of the conductor and engaged in a switching

movement. His testimony is to the effect that, under the snow, ice had been permitted to accumulate so as to be over an inch thick above the rails. The claim is that this was known to defendant's section foreman; that such ice was the cause of the derailment."

It was then stated in the opinion, in a general way, that defendant denied plaintiff's claims, and then it was said:

"Defendant's evidence puts the derailment before it reached the crossing, and attempts to attribute the derailment to the presence of the snow only.

"Under the evidence, it was for the jury to determine whether *plaintiff's* claims were true. Defendant's claims were *presented in opposition to the plaintiff's contention. This included the question of negligence, contributory negligence, and assumption of risk. The jury has committed us to plaintiff's version. The evidence is sufficient to sustain these findings."* (The opinion does not state that these findings were the result of passion and prejudice.)

We particularly call attention to the quotation just made in which the Supreme Court of Minnesota specifically said that the evidence was sufficient to sustain the findings of negligence on the part of the defendant. The Court said it was committed by the finding of the jury to plaintiff's version. The holding is clear, unequivocal and unqualified to the effect that the defendant was negligent and that its negligence caused plaintiff's injury. Up to this point in the case, there is no mention of passion or prejudice. AT NO PLACE IN THE OPINION, SO FAR AS THE QUESTION OF LIABILITY IS CONCERNED, DOES THE MINNESOTA COURT MENTION THE MATTER OF PASSION AND PREJUDICE.

From the facts, as they appeared, and from the jury's verdict, the Minnesota Court specifically said that the question of liability was for the jury, and *"the jury has committed us to plaintiff's version.* The evidence is sufficient to sustain these findings."

A reading of the opinion of the Minnesota Court leaves no doubt but that this verdict was not, in the opinion of the Minnesota Court, based on passion or prejudice.

The verdict was based on the evidence. The opinion of the Supreme Court of Minnesota held that the evidence was sufficient to sustain the verdict in plaintiff's favor and held that plaintiff was entitled to prevail.

Even in the dissenting opinion of Mr. Justice Stone, to which counsel for the railway company refer in their Brief, it is said: "The opinion demonstrates that the first jury yielded to passion and prejudice *in assessing damages.*"

There can be no escape from the proposition that, at most, the question of passion and prejudice *could only extend to the size of the verdict—to the amount of damages given*—questions with which this Court is not concerned.

The railroad company is confronted at the outset with a triple barrier:

First: *The record was not protected and the question of misconduct of counsel or prejudicial argument was not properly before the Supreme Court of Minnesota.*

Second: *The question is entirely one of state practice and procedure, and not one for consideration by this Honorable Court.*

Third: *The alleged prejudicial argument related to the amount of damages awarded and is not open to consideration here.*

Petitioner's Shifting Positions.

A reading of the Petition for the Writ of Certiorari herein will disclose a much different attitude on the part of counsel for Petitioner on the question of ultimate liability than appears in the Brief of Petitioner on the merits herein. *In the Petition for Certiorari the question of any liability on any theory was vigorously denied.* On page three of the Brief of Petitioner, filed after the writ was granted, but limited to appeals to passion and prejudice, it is said: "Thus there was a *fundamental question of fact for the jury on which petitioner's liability depended.*" No such statement appeared in the original petition.

Again on page six of the Brief of Petitioner, it is said: "The evidence as to the facts on which petitioner's liability was asserted *made a question for the jury as to their existence.*

In the Petition for the Writ on page 20, reliance is placed on the case of *New York Central R. Co. vs. Johnson,* 279 U. S. 310. This was a case which originated in a Federal Court and in the opinion of this Court there were some general statements to the effect that objections need not be taken to the argument of counsel. In that case, however, objections were taken in the Court below, the principal claim being that they were not sufficiently specific. However, that case was one originating in a Federal Court. *It did not involve a state rule of practice and procedure as did the case at bar.* The citation of the case may well have mislead the Court as pointed out by Respondent on page eight of its Brief on the Motion to Dismiss or Affirm herein. No mention of the Johnson case is made in the Brief of Petitioner.

THE ATTACK ON COUNSEL FOR PLAINTIFFS GENERALLY.

Pages 13 to 28 of Petitioner's Brief deal with the general question of the right of plaintiffs to maintain actions in certain places, the question of bringing actions in jurisdictions where the cause did not arise, so-called "ambulance chasing," etc.

These questions are not before this Court. They have nothing whatever to do with the question of whether or not the Petitioner has come within the rules laid down by the laws of the State of Minnesota and by this Honorable Court. This portion of the Brief, consisting of a general attack on personal injury lawyers, written in the vein of virtue so often assumed by defendants' counsel, is in point on no question before this Court.

It cannot but be apparent to the Court that the purpose of this matter, the cry of ambulance chasing, solicitation, etc., is made with the hope and with the idea that it will prejudice this Honorable Court against Respondent and Respondent's counsel.

It cannot but be apparent to this Court that counsel who would indulge in conduct of this kind, who would devote over half of a brief to the statement of matters intended to be prejudicial *might well have conducted themselves with like impropriety in the trial court.*

The Brief contains numerous references to causes with which counsel for Respondent herein were not concerned, in which they did not act as counsel and in which they had no part. *Criticism of other counsel for plaintiffs is set forth in the Brief.* For what purpose? Does it assist the Court in determining whether or not railroad counsel in the present case observed the rules of the State of Minnesota? Does it

assist the Court in determining whether railroad counsel are within the rules laid down in the DeAtley, White and Bombolis cases, *supra*? Clearly, it does not, and its sole and only purpose is to try to prejudice the Highest Court in the land, to get into the minds of this Court that counsel for this Respondent are mere "ambulance chasers" suborners of perjury and that, therefore, established rules of practice, procedure and of law should be set at naught and this injured man should be sent back again to once more go through the ordeal of trial, motion for new trial, appeal to the Supreme Court of Minnesota, the customary and much abused application for a Writ of Certiorari and all that such proceedings entail.

On page 28 of the Brief the following occurs:

> "A reading of counsel's so-called 'argument' to the jury (R. 383-413) discloses an *unmistakable purpose* to prevent the jurors from giving impartial consideration to the questions on which petitioner's liability depended."

This statement is not borne out by the record. It cannot be sustained by a reading of the argument. There was no "unmistakable purpose to prevent the jurors from giving impartial consideration" to the questions of liability in the case. We earnestly invite a reading of the record on the question of liability. Facts were argued to the jury. There was no attempt to prevent the jurors from giving impartial consideration to the question of liability.

Furthermore, on the question of liability, there is nothing in the record even remotely indicating any passion or prejudice. It specifically appears from the opinion of the Supreme Court of Minnesota that the *only question of passion or prejudice in the case related to the amount of the verdict.*

The amount or size of the verdict is not open to consideration here.

If we assume, as we must under the record, that Petitioner's ultimate liability is based on negligence, which the jury found, which the trial court upheld, and which the Supreme Court of the State of Minnesota upheld, then the only question to which passion and prejudice could relate is the question of the amount of the verdict. Mr. Justice Dibell, in a dissenting opinion, said there was no passion or prejudice shown. Mr. Justice Stone said there was passion and prejudice "in assessing damages."

A consideration of the question of damages in this case, will disclose that the Court could well have upheld the verdict under the cold record as heretofore pointed out.

However this may be, the question of the amount of damages is not one for consideration by the Supreme Court of the United States. *The proper rule of damages was given to the jury. The proper measure of damages* was explained to them. There is *no question* before this Court *that any improper instruction was given to the jury* as to the permissible method of computing the damages. Where the *proper rule and measure* of damages is given to the jury, the question of the *amount* is for the jury's consideration, subject to the corrective power of the lower court. It does not present a question for this Court.

However, it may be said that the Supreme Court of the State said that *the verdict* was the result of passion and prejudice and that a verdict so resulting cannot stand under the Federal Act.

The answer to this contention is that the *verdict was not the result of passion and prejudice*, so far as the question of liability is concerned. The question of passion and prejudice had to do solely *with the amount of the verdict.*

To reverse this case because the verdict was excessive because of passion and prejudice would lay down a new rule and would mean that in every case where a state court reduces a verdict because excessive "appearing to have been given under the influence of passion and prejudice," the Supreme Court of the United States would grant a new trial. To answer categorically the question of whether a verdict resting *solely* on passion and prejudice could be sustained, we would say "No." A verdict under the Federal Act must rest on negligence. This one does. It rests on strong proof of negligence, amounting almost to wantonness. The Respondent sustained serious injuries. A jury made an award of damages. The Supreme Court thought the award was too high, "appearing to have been given under the influence of passion and prejudice." *There is nothing in the record at any place to in any way justify any claim that the question of liability was arrived at because of passion and prejudice.* The few statements singled out from counsel's argument with one exception relate to the question of damages.

The charge of impropriety can with much better grace be levelled against counsel for Petitioner because of the use of such words as "unscrupulous, improper practices" (28); "vicious tendencies" (27); "cases * * * procured, fomented and tried in contemptuous defiance of law and proper legal practices" (27); "illicit investments" (27); "illicit methods of recovery" (28); and the claim made at the top of page 28 of the Brief of open and flagrant appeals "in order to induce the jurors to violate their oath" (28).

These statements are improper, unwarranted, unfair, unjustified, uncalled for by anything in the argument of counsel to the jury in this case. We will not, in this Brief, retort in language of the kind used by Petitioner's counsel. It would not be becoming a practitioner before the Supreme

Court of the United States so to do. We will merely submit the matter to this Court with a statement that a reading of this most intemperate Brief cannot but convince the Court that in comparison with the conduct of counsel for the railroad company, the argument of Respondent's counsel was extremely mild.

In the first paragraph of page six of the Brief for Petitioner, it is said that counsel for the plaintiff *"deliberately invited* the element of passion and prejudice into the case to improperly influence the jury."

We invite a most careful reading of counsel's argument and there is no question but that such statement cannot possibly be sustained.

It cannot be that a client is to be punished because of the honest zeal of his counsel. We do not believe that the time has come when in an action to recover damages for an injured man, plaintiff's counsel must present his argument to the jury in a sing song monotone. The Honorable Pierce Butler of this Court did not present matters to a jury in that fashion when he was engaged in the trial of causes in the State Courts of Minnesota and other states. It has never been said that the Chief Justice of this Honorable Court employed that method in presenting causes in behalf of his clients, nor has it yet been held by any court that a mere show of some life and of some emotion on the part of an attorney constitutes a wrong.

If, by a wild flight of the imagination, we assume that the argument in question was improper, can this Court now say that the due and proper administration of justice dictates that the Respondent, Noah Moquin, must be punished by having his case sent back again for retrial? We cry about the law's delays. Is there any rule of justice or of law which requires that this man, who was injured by the un-

doubted negligence of the railway company, on the 27th day of February, 1928, should now, more than three years after the date of his injury, be told that he must go back again and start to climb the long hill of a trial, in the District Court, the inevitable appeal to the Supreme Court and the now popular and abused application for a Writ of Certiorari? Justice not only does not demand that this be done but it will cry out in abhorrence at the thought of compelling this litigant to again go through this ordeal because, perchance, his counsel may have grown enthusiastic in his zeal to protect the rights of his client. It is like punishing one for a crime when there is no statute defining the crime. If the wrong was committed, Respondent's counsel had no knowledge thereof at the time, no objection was made, he was given no opportunity to retract or ask the jury to disregard the statement or to make amends or to state that the statement was in answer to counsel's argument.

The trial court was given no opportunity to admonish the jury to pay no heed to the statement. The Supreme Court of the state said that the point had been waived and now, three years after Moquin has been injured, it is asked, in the interests of justice, to send him back to a State Court to again follow the weary road to the doors of this Honorable Court.

This Court is asked to do this, despite the rule of the State Court, despite the fact that this Court does not consider the question of damages, despite the fact that this Court has repeatedly said that such matters of practice and procedure were wholly for the State Court's determination.

It is bad enough to think that nearly a year has now elapsed since this man's rights were determined by the Supreme Court of the State of Minnesota. Still he is without the recovery which the jury and the Minnesota court

awarded him and Petitioner, with a show and claim of virtue, insists that, despite its failure to observe the settled rules of practice of the State of Minnesota, that this Court should order this man back to trial in the District Court of the State.

If this is done, it will result in overturning the settled practice of the State of Minnesota. It will be a new and a startling rule—*a rule to the effect that the law of the state as to practice and procedure in causes before it no longer controls* but that *on any question of practice and procedure,* on the question of the mere amount of damages, *the laws of the state are to be set aside* and the established rules of procedure are to be overturned and because of what? Because of an argument, which taken in its entirety, is not unfair, is not prejudicial, but merely represents the honest, zealous effort of counsel to secure justice for an injured man.

CONCLUSION.

The Petition for the Writ herein was, we believe, improvidently granted, and it should be dismissed. If the Writ were properly granted, then on the merits of the cause the judgment should be affirmed. The scurrilous matter in Petitioner's Brief should be ordered stricken.

Respectfully submitted,

TOM DAVIS AND ERNEST A. MICHEL,

Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 543.—October Term, 1930.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Petitioner, *vs.* Noah Moquin. } On Writ of Certiorari to the Supreme Court of the State of Minnesota.

[May 18, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

Respondent sued petitioner in the district court of Crow Wing County, Minnesota, to recover damages for injuries sustained in the course of his employment in interstate commerce. The trial resulted in a verdict for the respondent, which petitioner moved to set aside on the ground that misconduct of respondent's counsel in making appeals to passion and prejudice had prevented an impartial trial. The motion was denied, and petitioner appealed to the Supreme Court of Minnesota. That court referred to the state practice which requires counsel to interrupt and have the language used by offending counsel placed upon the record, to ask the court to instruct the jury to disregard it, and to take an exception, if thought advisable. It, however, criticised the conduct of respondent's counsel, and said: "In the absence of objection from counsel, it may become the duty of the court to act on its own motion. . . . From the entire record before us we are of the opinion that the verdict is excessive because of passion and prejudice."

A new trial was ordered, unless the respondent should file in the trial court a writing remitting a portion of the verdict. Such a remittitur was filed, and thereupon the trial court entered judgment for the remainder. The petitioner again appealed, and the Supreme Court affirmed, merely referring to its previous opinion. We granted a writ of certiorari limited to the question arising from the failure of the state court to grant a new trial in a case under

the Federal Employers' Liability Act where the verdict was obtained by appeals to passion and prejudice.[1]

It is unnecessary to cite from the record what occurred at the trial, or to discuss the propriety of the views of the court below as to the basis of the verdict. The finding is quoted above, and our sole concern is as to the action it requires. Nor need we inquire into the rules applicable in trials under state law. Whether under the state's jurisprudence the present record would entitle petitioner to a new trial or to such a conditional order as was awarded is immaterial.

In actions under the federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[1]282 U. S. —.